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Supreme Court of the United States

October Term, 1983

RAYMOND WALKER,
Cross-Petitioner,

vs.

STATE OF OHIO,
Cross-Respondent.

CROSS-PETITION FOR A WRIT OF CERTIORARI
HABEAS CORPUS
To the United States Court of Appeals
For the Sixth Circuit

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QUESTION PRESENTED FOR REVIEW

Whether the United States courts, in reviewing the sufficiency of the evidence supporting a state criminal conviction in a habeas corpus proceeding, may disregard the evidence presented by the defense.

PARTIES

The original Respondent to Walker's application for a writ of habeas corpus was Arnold Jago, Superintendent of the Southern Ohio Correctional Facility at Lucasville, Ohio. His successor, R. C. Marshall, was thereafter substituted as respondent in various papers filed by the parties. In the orders of the United States courts, Ted Engle, who is Superintendent at the Chillicothe Correctional Facility at Chillicothe, Ohio, was captioned as Respondent. Since the Stark County Prosecutor, who has been designated as Special Assistant Attorney General by the Attorney General of Ohio to prosecute this case, has designated his client as the State of Ohio, we have acted accordingly.

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OPINIONS BELOW

The opinion of the Court of Appeals is reported at 703 F.2d 959 and is appended; the opinion of Judge William K. Thomas of the United States District Court for the Northern District of Ohio is unreported and appended; the report and recommended decision of Magistrate David S. Perelman is not appended because of its length. The opinion of the Ohio Supreme Court, which affirmed Walker's conviction, is reported at 55 Ohio St. 2d 208, and is appended.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on March 23, 1983. A timely petition for rehearing *en banc* filed by the Cross-Respondent was denied on June 24, 1983; and this Cross-Petition for Cer-

tiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U. S. Const. amend. XIV §1, which provides in pertinent part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. . . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . .

STATEMENT OF THE CASE

On July 22, 1972, Guy Mack, a Canton policeman who at the time was off duty, was shot and killed by one of four men attempting to rob an A & P grocery store in Canton, Ohio, at which Mack and his wife were shopping. Two of the four felons, neither of whom was the triggerman, Warren Davidson and Fred Ogeltree (hereinafter collectively referred to as "Accomplices") were apprehended shortly thereafter and convicted of first degree murder under the felony murder rule.

Three years later, while incarcerated in the Southern Ohio Correctional Facility at Lucasville, Ohio, they approached Fred "Stretch" Meyers, an inmate who was known as the jailhouse lawyer. They complained that they should not have been sentenced for life, since they had not killed anyone, the murder having been committed by a "junkie from Detroit". Meyers explained the felony murder rule to them, told them that they could expect

commutation of their sentences only if they named the triggerman, and that the designation of an anonymous junkie would not satisfy the authorities. Ogeltree replied that he did not know the name of the triggerman, but would have a name in a week, namely, "the nigger that's laying my old lady".

Thereafter the Accomplices contacted the Stark County authorities; Canton is the county seat. Walker was arrested and on December 23rd was placed in a line-up with five other men, Walker being No. 5. Four eyewitnesses to the robbery and murder viewed the line-up. Two could make no identification. Mable Mack, wife of the decedent, and Rene Clark, who at the time of the murder was 16 years old, designated Subject No. 1 as the triggerman, Miss Clark with a question mark.

Walker was indicted on March 12, 1976 and tried shortly thereafter. Having no recollection of where he was four years before, he called upon his constant companion, Lamar Potts, who testified that on July 22, 1972 the two were drinking at various bars in the Glenville area of Cleveland, where they resided. The prosecution demolished the alibi by bringing in Potts' employment record, which showed that on July 22, 1972 he was working. At that point Walker and his lawyer, Stanley Tolliver, remembered that Walker had been in the Cuyahoga County Jail, which fact was confirmed by the testimony of the deputy sheriff in charge of the records of the Cuyahoga County Jail. The jury was dismissed, being unable to reach a verdict.

Walker was retried on August 23, 1976 and was convicted. The conviction was affirmed by the Court of Appeals of Stark County and the Supreme Court of Ohio. This Court denied Walker's Petition for a Writ of Certiorari to the Supreme Court of Ohio.

Thereafter in November, 1979, Walker filed an application for a writ of habeas corpus under the authority of 28 U.S.C. §2254 in the United States District Court for the Northern District of Ohio, alleging that his conviction was constitutionally deficient in that no rational finder of fact could have convicted him upon the evidence submitted; that the review of his conviction by the Ohio courts was constitutionally deficient in that the standard was based upon whether there was substantial evidence which, if believed, would convict, rather than whether any rational mind could find guilt beyond a reasonable doubt from the evidence presented; and that the conduct of the trial was such as to deny him due process.

The district court referred the matter to Magistrate David S. Perelman. An evidentiary hearing was not requested and the application was reviewed on the record of the Ohio proceedings. Mr. Perelman reported that the trial was conducted in such a manner as to deprive Walker of his due process rights and that no rational finder of fact could have convicted Walker upon the evidence presented. He recommended that Walker be discharged. Objections were filed by the Attorney General of Ohio and Judge Thomas, after conducting an independent review of the record, agreed that the trial had been conducted unfairly in violation of Walker's due process rights, but held that the evidence was sufficient to convict and declined to order Walker's discharge. The Stark County Prosecutor was appointed Special Attorney General in the case and appealed to the Court of Appeals for the Sixth Circuit. Walker filed a cross-appeal raising the discharge issue. The Sixth Circuit affirmed and the State of Ohio petitioned this Court for a writ of certiorari, being docketed as No. 83-151. Walker has filed this cross-petition for a writ of certiorari.

REASON FOR GRANTING THE WRIT

The Decision Below Misconstrues the Standard Set by This Court in *Jackson v. Virginia*, 443 U.S. 307 (1979) for Reviewing a State Court Criminal Conviction in Order to Test Its Sufficiency.

In *Jackson v. Virginia*, this Court held that a state court criminal conviction was constitutionally defective under the Fourteenth Amendment if no rational finder of fact could find guilt beyond a reasonable doubt of every element of the crime upon the evidence presented, and that habeas corpus relief was available to a person so convicted. The standard of review by the United States courts was set forth by this Court at 443 U.S. 318 as follows:

> After *Winship*[1] the critical inquiry on review of the sufficiently of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. But this inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." *Woodby v. INS*, 385 U.S. 276, ... Instead the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson v. Louisiana*, 406 U.S. 356, 362, 92 S.Ct. 1620, 33 L.Ed.2d 152. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the

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1. *In re Winship*, 397 U.S. 358 (1979).

> testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. (Emphasis the Court)

This statement has been construed to require the United States courts to disbelieve or ignore the evidence offered by the defendant, *Cosby v. Jones,* 682 F.2d 1373 (10th Cir. 1982) at page 1382; Comment, *Federal Review of the Evidence Supporting State Convictions: Jackson v. Virginia,* 79 COLUM. L. REV. 1577, 1579-1580 (1979).

The United States courts in this case apparently agree. Rather than making a qualitative evaluation of the evidence, that is comparing the proof that Walker was in jail on July 22, 1972, making it impossible for him to have been in Canton to the tainted testimony of eyewitnesses placing him there, they reduced their function to simply ascertaining if there was a conflict in the evidence, which of course there was, labelled the matter credibility and resolved it in favor of the prosecution.

Our position was set forth by the Sixth Circuit at 703 F.2d 969 (A20) as follows:

> Walker's main objection to this conclusion is as follows: Rather than a selective review of the prosecution's case, Jackson requires that all the evidence be weighed so as to ascertain whether any rational trier of fact could find guilt beyond a reasonable doubt.

It answered, at that page, as follows:

> This argument must fail since it merely urges this Court to weigh the credibility of the witnesses. This

> we cannot do. We agree that, from the record, the witnesses for Walker appear more credible than those for the state, and if we were jurors, we might be inclined to vote to acquit in this case. But the inquiry as to sufficiency of the evidence does not require or permit a court "to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. Looking at the case in the light most favorable to the prosecution appears to mean resolving credibility conflicts in favor of the prosecution.

And Judge Thomas concluded at A63:

> Although Walker's alibi evidence is unique and differs from the nature of the alibi evidence presented in *Harris*,[2] the point remains that under *Jackson* conflicts in the evidence are to be resolved by the federal habeas corpus court in favor of the prosecution. The trier of fact in this case, as in *Harris*, was "entitled to make that choice in the manner which it did." On the competent and relevant evidence of record, this court cannot say the jury acted irrationally.

The quality of Walker's defense is unparalleled. The prosecution stipulated that the jail and court records of Cuyahoga County registered Walker in jail from April 14, 1972 until August 1, 1972. The jail commissary records showed purchases and payments by Walker continuously throughout this period. Three fellow inmates testified that Walker was in the Cuyahoga County Jail continuously during this period, except when he was summoned to court, and that if he had been out for an entire night, the incident would have been so unusual as to cause each of them to remember it. The physical characteristics of the

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2. *Harris v. Clusen*, 487 F. Supp. 616 (E.D. Wisc. 1980).

jail rendered it impossible for Walker to easily slip in and out. As pointed out by the Magistrate at page 102 of his report:

> As the prosecution did not contest that Raymond Walker entered the Cuyahoga County Jail on April 14, 1972, and left on August 1, 1972, in order to have killed Guy Mack on July 22, 1972, Mr. Walker would have to have accomplished, by stealth or bribery, the following: remove his identification card from the fifth floor; pass through the locked gates on the fifth floor; proceed by elevator manned by a deputy to the floor where his civilian clothes garb was kept; obtain his civilian clothes and change from his prison uniform; proceed by manned elevator to the basement; pass through three locked gates; remove a second identity card and alter the inmate count as kept on the jail slate; clear the booking desk area; to Canton and commit the crime; return to the jail and clear the booking desk without signing in; return his identification card and alter the inmate count as kept on the jail slate; pass through three locked gates; proceed by manned elevator to the receiving floor; exchange his civilian clothes for prison garb; return by elevator to the fifth floor; pass through a locked gate back to the cell block; return his floor card.

The Sixth Circuit at 703 F.2d 969, A19, approved Judge Thomas' analysis of the evidence. Judge Thomas at A60 considered discrepancies in the floor records at the jail and at A61 the failure of the Clerk of Courts to record Walker's appearances in court significant. Neither dents the alibi. The primary responsibility of the floor guards was to control and feed 50 prisoners, supervise visitation, release prisoners for court appearances, sick call or discharge. Among the myriad of other duties was maintaining the

floor cards, in which they were frequently slack. But the absolute assiduous obligation to assure the full complement of prisoners was upon the booking desk and the third shift, which were required to reconcile the physical count in the jail with the register and slate at the booking desk. The unrebutted evidence is that this system showed a full complement of prisoners on every night during Walker's confinement. Similarly, the fact that the docket of the Clerk of Courts did not record Walker's appearances in court is insignificant, since there is no reason for the Clerk to record a pretrial at which nothing happens, especially if he is not notified of the pretrial by the bailiff or the assignment commissioner.

Even without the alibi, the prosecution's evidence was weak. The jury believed the testimony of the Accomplices and chose to disbelieve that of Fred Meyers and two other witnesses to whom Ogeltree had admitted that Walker was not involved in the A & P robbery. Mable Mack, who could not bring herself to positively identify Walker as the triggerman, but stated merely that he looked like the gunman, and Rene Clark, both picked the identical wrong man out of the line-up. Judge Thomas at A55-57 apparently felt that the jury could rationally believe Rene Clark's explanation that she knew all the time that Walker was the man, but out of fear had marked No. 1 with a question mark. She then stated that she went up to Detective Newkirk, who had brought her down from Detroit for purposes of viewing the line-up and told him that she knew that Walker was the man and had made the misidentification out of fear. Not only does Newkirk not confirm the fact that Miss Clark told him she recognized Walker, but also contradicted her statement that she approached him. He testified at page 973 of the Transcript as follows:

> The statement I made to Rene after she had marked the line-up card and I had no idea what she had marked—I walked in. I looked. I saw she had circled number one and put a question mark behind it. I had walked out of there and I saw she was just in the process of leaving the county jail. She was leaving. So I walked up to her and I made the statement to her I ought to kick your butt all the way back to Detroit. That is what I said to her.

Miss Clark was a very self-assured witness. When confronted with her description of the triggerman as being darker than one Mr. Dansby or than Mr. Tolliver, both of whom are darker than Walker, she explained that Walker had obviously acquired a suntan during the summer of 1972, which, of course, he spent in the Cuyahoga County Jail. Having the home court advantage, Miss Clark was not one to be ruffled.

The testimony of Curry and Cash, friends of Ogeltree, that they saw Walker continuously on the streets in the summer of 1972, is of doubtful quality being based upon a four-year-old recollection. Furthermore, as Justice Paul Brown inquired of the prosecution during oral argument before the Ohio Supreme Court, could they not have found some respectable people, a grocer or a barber who had seen Walker on the streets during that period? It is significant that neither the Accomplices nor Curry or Cash mentioned that Walker was boarding at the Cuyahoga County Jail during this period, a fact of which one assumes they would have been aware had their relationship been as close as that testified to. It is inconceivable to us that any rational trier of fact could conclude that Walker slipped out of jail on the night of July 20, 1972, met with the Accomplices, drove to Canton, drove back to Cleveland, drove to Canton again on July 22nd, entered the

A & P, shot Guy Mack, drove back to Cleveland, sneaked back into jail and, when apprehended and tried four years later, completely forgot that he had the jail alibi available and called upon his friend, Lamar Potts, to testify that they had been drinking together. As Justice Celebrezze, now Chief Justice, stated in his dissent at 55 Ohio St. 2d 221 (A86):

> In light of the nature of appellant's alibi evidence, vis-a-vis the evidence presented by the state in rebuttal of the alibi, there must be some doubt in a reasonable mind as to the guilt of appellant. To conclude otherwise is to argue that the average reasonable mind would be convinced that one confined in the Cuyahoga County jail could manage to escape therefrom, could travel to another county, there to commit a murder, and could later re-enter the jail facility, undetected, only to be subsequently released by an order of the court. I believe it patently apparent that such a theory is rife with reasonable doubt.

To limit the review of the evidence to a simple examination of conflicts, as was done by the United States courts in this case, renders the holding of this Court in *Jackson v. Virginia* indistinguishable from the no evidence test of *Thompson v. City of Louisville*, 362 U.S. 199 (1960) rejected by the majority in *Jackson*. We do not contend that the prosecution in *State v. Walker*, did not offer evidence to prove every element of the crime. We submit, however, that upon a review of all of the evidence in that case, no rational trier of fact could find guilt beyond a reasonable doubt.

CONCLUSION

In order to clarify its opinion in *Jackson v. Virginia*, and to correct an enormous injustice, this Court should issue a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

(Filed March 23, 1983)

Nos. 81-3117, 81-3260

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAYMOND WALKER,
Petitioner-Appellee, Cross-Appellant,

v.

TED ENGLE,
Respondent-Appellant, Cross-Appellee.

ON APPEAL from the United States District Court for the Northern District of Ohio.

Before: KEITH and JONES, *Circuit Judges* and BROWN, *Senior Circuit Judge.**

JONES, *Circuit Judge*, delivered the opinion of the Court, in which KEITH, *Circuit Judge*, joined, BROWN, *Senior Circuit Judge* (p. 20) filed a separate concurring opinion.

JONES, *Circuit Judge*. The State of Ohio appeals the district Court's grant of a writ of habeas corpus to Raymond Walker. [2] Walker cross-appeals from the failure

*The Honorable Bailey Brown retired from regular active service under the provisions of 28 U.S.C. § 371(b) on June 16, 1982 and became a Senior Circuit Judge.

of the district court to hold that a retrial on the charge of first-degree murder was precluded by an insufficiency of the evidence. We affirm the order of the district court granting the writ of habeas corpus and the remand for a new trial.

On July 22, 1972, a robbery occurred at an A&P supermarket in Canton, Ohio. Guy Mack, an off-duty detective with the Canton City Police Department, was shot and killed during the robbery.

The robbery was committed by four men, three of whom entered the store while the other remained outside. In 1973, Warren Davidson and Fred Ogletree were convicted as aiders and abettors in the robbery and homicide and sentenced to life imprisonment. Neither man, however, was believed to be the triggerman.

In late 1975, while incarcerated, Davidson and Ogletree contacted Stark County authorities and implicated Walker as the triggerman in the killing. In return for their testimony against Walker, Stark County officials recommended leniency to the Governor of Ohio.

Walker was indicted on March 12, 1976. The first trial ended with a hung jury.[1] At his second trial, Walker contended by way of alibi that he was confined in the Cuyahoga County Jail on July 22, 1972, the day of the robbery and killing. The official records of the Cuyahoga County Sheriff's Department, which were stipulated to by counsel, reflected that Walker was indeed confined in the Cuyahoga County Jail from April 14, 1972 to August 1, 1972. In response the state introduced an abundance of evidence attempting to show that the officers charged

1. The magistrate noted that, according to petitioner's brief, when the jury was discharged the panel stood 10 for 2 for acquittal. App. 28.

with running the Cuyahoga County Jail were so corrupt and/or inefficient that Walker could have gotten out of jail before July 22 and then returned to jail before August 1.

After his second trial, Walker was convicted of first-degree [3] murder. His conviction was affirmed by the Ohio Fifth District Court of Appeals in June 1977. Walker appealed to the Ohio Supreme Court which, in a divided vote, affirmed his conviction. *State v. Walker*, 55 Ohio St.2d 208 (1978). In April 1979, the United States Supreme Court denied Walker's petition for a writ of certiorari. *Walker v. Ohio*, 441 U.S. 924 (1979).

In November 1979, Walker filed a petition for writ of habeas corpus under 28 U.S.C. § 2254. The petition listed three grounds for relief: (1) that the Ohio appellate courts erred in failing to apply the standard of review enunciated by *Jackson v. Virginia*, 443 U.S. 307 (1979); (2) that under the *Jackson* standard, no rational trier of fact could have found Walker guilty of the Mack killing beyond a reasonable doubt; and (3) that numerous trial errors resulting in the admission of irrelevant and inflammatory evidence cumulatively operated to deny Walker a fair trial.

The magistrate filed a 108-page recommended report and decision in which he carefully reviewed the testimony of the forty trial witnesses and examined the conduct of the prosecutor in questioning witnesses and delivering his closing argument.[2] The magistrate ultimately agreed with Walker that the state's evidence regarding corruption and inefficiency at the Cuyahoga County Jail went so far beyond meeting the legitimate issues that the focus of the trial was no longer on Walker's guilt or innocence, but rather on the allegedly unlawful conduct of the officials

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2. App. 27-134.

running the jail. He concluded that the cumulative effect of the evidentiary errors was to deny Walker fundamental fairness. Having determined that a writ of habeas corpus should issue, the magistrate then analyzed the sufficiency of the evidence and concluded that a retrial of Walker was precluded by *Jackson* because of evidentiary insufficiency.

The district court then issued an opinion which, for reasons [4] "independently reach[ed]," concluded that Walker was denied a fair trial in violation of the due process clause of the Fourteenth Amendment. However, the district court disagreed with the magistrate's conclusion that *Jackson* precluded a retrial, holding that apart "from the prejudicial evidence, the prosecution produced sufficient other evidence which, viewed in the light most favorable to the prosecution, would permit a reasonable trier of fact to find Walker guilty beyond a reasonable doubt."[3]

These appeals followed.

I

The major questions we are required to decide are (1) whether the district court was correct in concluding that the admission of certain evidence by the state operated to deny Walker due process of law; and (2) whether the evidence against Walker was so insufficient as to preclude a retrial.

We begin our discussion with the proposition that errors in application of state law, especially with regard to the admissibility of evidence, are usually not cognizable in federal habeas corpus. *Bell v. Arn*, 536 F.2d 123 (6th Cir. 1976); *Reese v. Cardwell*, 410 F.2d 1125 (6th Cir. 1969).

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3. App. 138.

Yet, errors of state law, including evidentiary rulings, which result in a denial of fundamental fairness will support relief in habeas corpus. *Handley v. Pitts,* 491 F.Supp. 599, *aff'd.,* 623 F.2d 23 (6th Cir. 1980); *Maglaya v. Buckhoe,* 515 F.2d 265 (6th Cir.), *cert. denied,* 423 U.S. 931 (1975); *Gemel v. Buckhoe,* 358 F.2d 338 (6th Cir. 1966).

The magistrate, in concluding that the cumulative effect of the evidentiary errors denied Walker due process, relied on the entire record. A condensation of his lengthy and excellent analysis would not now be fruitful, since the district court based its findings on six specific aspects of the trial. It should [5] be noted that even these six alleged errors must be considered for their cumulative effect. Errors that might not be so prejudicial as to amount to a deprivation of due process when considered alone, may cumulatively produce a trial setting that is fundamentally unfair. *United States v. Jones,* 482 F.2d 747 (D.C. Cir. 1973); *Newman v. United States,* 311 F.2d 74 (5th Cir. 1962); *United States v. Maroney,* 373 F.2d 908 (3rd Cir. 1967). It will suffice for our consideration to assess the six alleged trial errors and their cumulative effect.

II

A. Evidence of criminal conviction of Major Payne.[4]

Payne had been Warden of the Cuyahoga County Jail before and after, but not during, Walker's recorded period of confinement. The prosecution, over defense counsel's strenuous and continuing objections, was allowed to question two defense witnesses about Payne's criminal convic-

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4. Throughout the state court trial and subsequent proceedings, references are made to a "Major Paine." This Court takes judicial notice of the fact that the correct title and name are Major Edward Payne.

tion (which came well after Walker's recorded period of detention) for theft of property from the jail. When a defense witness stated that "I think it was something about two guns that were missing," the prosecutor asked, "What was it, evidence?" Defense counsel once again objected on grounds of relevancy, but the trial court ruled, "No, it's very relevant in this case. Overruled." The prosecutor then continued his attack on the integrity of the Sheriff's Office personnel.

The district court held that the testimony regarding Major Payne's conviction:[5]

> bore no relevance to the state's case or any issue concerning the accuracy of jail records or record keeping procedures or, more generally, to the reliability of jail **[6]** security. Contrary to the trial judge's on-the-record conclusion that Paine's [sic] testimony was "very relevant in this case," it had no tendency to make the truth or falsity of Walker's alibi more or less probable than it would be without the evidence .... Its sole purpose and clear effect was to prejudice the jury's consideration of Walker's alibi.

The state replies that:[6]

> It is submitted that the relevance of the testimony concerning Major Payne may be said to arise from the quality of the supervisory personnel selected to keep and maintain the Cuyahoga County Jail records upon which the alibi was dependent. To this extent it should make no difference whether the record indicates an act of supervisory capacity at the exact time of Walker's incarceration .... The question with regard to Major Payne reflect [sic] on the security of evi-

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5. App. 142-43.
6. State's Brief at 11-12.

> dence held at the jail, and jail security was a major issue in the trial of a case in which it appears that a supposed inmate was able to commit a crime in a town sixty miles away.

We agree with the district court that (1) the record is clear that Mayor Payne was not employed at the jail during Walker's incarceration, and (2) testimony regarding "the security of *evidence* held at the jail" has no apparent connection to the issue whether a *prisoner* could leave the jail *and return* undetected.

B. Testimony of State Auditor.

Walker introduced jail commissary records to show that he made numerous transactions during his confinement, including one on the day of the crime. The prosecutor endeavored to undermine this circumstantial evidence by testimony of jail [7] deputies that inmates other than Walker could have made purchases using his commissary account.

However, the state added to this impeachment by calling Frank Lancianese, an examiner for the Office of the State Auditor. He testified, over repeated objections, that (1) an audit of the commissary account funds between 1969 and 1975 revealed a $66,000 shortage; (2) the State Auditor's Office encountered "obstacles" in gaining access to the commissary records; and (3) an audit of jail vending machine profits revealed $9,000 unaccounted for by the Sheriff's Department. The prosecutor used this testimony in his closing argument as follows:

> We have brought the records to you concerning the audit of the sheriff's department for one reason alone. To show you that all the thieves and the bad people weren't on the inside of the jail; that if you lie and

> steal what says you won't let a prisoner out for a weekend or a few days.

The district court properly concluded that the admission of the auditor's testimony bore no relationship to the issues raised by Walker's alibi defense, was highly prejudicial, and was calculated to sway the jury on the basis of guilt by association.

The state argues that the auditor's testimony regarding theft from the commissary fund "was relevant to rebut the accuracy of commissary records relied on by Walker in support of his alibi defense."[7] This contention must be rejected, since the alleged thefts did not affect the *record of commissary transactions* relied on by Walker, but showed merely that *commissary* funds may have at some time been misappropriated by Sheriff's Department personnel. As for testimony regarding the vending machines, the state is compelled to concede that it "was not relevant by any definition."[8]

[8] C. References to Tom Booth.

Tom Booth, a member of the Cuyahoga County Sheriff's Department, attended and viewed the trial but was not a witness. The prosecution was permitted, without any basis in the record, to insinuate that several defense witnesses from the Sheriff's Department were being monitored and coached by Tom Booth in furtherance of a Sheriff's Department coverup of improprieties. The state replies that the cross-examination of the defense witnesses was a proper inquiry to determine their credibility and whether they had in fact been coached. The state adds that since control of cross-examination is committed to the discretion of the state trial court, the trial court's

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7. State's Brief at 12.
8. State's Brief at 13.

rulings are not cognizable on habeas corpus. In support of the latter contention, the state cites *U.S. ex rel. Hickey v. Jeffes*, 571 F.2d 762 (3rd Cir. 1978). *Hickey*, however, merely held that a state trial court's admission of certain evidence did not, under the facts of that case, constitute an error of constitutional dimensions. 571 F.2d at 766. *Hickey* does not hold that errors in discretionary rulings can never rise to constitutional dimensions; on the contrary, it is clear that they can. *Gemel v. Buckhoe*, 358 F.2d 338, 340 (6th Cir. 1966).

D. Testimony of Canton Police Sergeant Newkirk.

Walker was first located in Chicago, Illinois. Newkirk was allowed to speculate, over objection, that Cuyahoga County authorities impeded Walker's extradition from Illinois to Stark County. The state makes a claim of relevancy. We agree with the district court's finding that this testimony was highly irrelevant and prejudicial conjecture.

E. The John Appling Affair.

As part of its case in chief, the state called John Appling to the stand. Appling, a prisoner in 1972, had served as a "range boss" for the cell block to which Walker was assigned. He [9] refused to be sworn, at which point the trial court began to question Appling concerning his reasons for not wanting to be sworn or to testify. After excusing the jury, the judge called counsel for both sides to the bench. At that conference, the following interchange took place:

> The Court: Counsel approach the bench please?
>
> (Counsel Approach the Bench)
>
> Mr. Ake: Your honor, the testimony we have that we believe he can relate has absolutely nothing

to do with any Fifth Amendment right of his. We are willing to put on for your benefit Detective Newkirk who can give you that testimony to make a determination. He basically—we are—we have testimony to the affect [sic] that he was in the jail in 1972 with Raymond Walker; that Raymond Walker—that he himself was allowed to walk free from the county jail; that he knows of certain activities in the county jail and that he in fact saw Raymond Walker on the outside of the county jail building isn't that correct?

Mr. Jaeck: That's correct. During the time that he was supposed to be confined.

Mr. Tolliver: That has to be in conflict because I had the privilege of talking to this gentleman last night myself and that's not what he told me.

The Court: He refuses to testify.

Mr. Tolliver: I'll take the stand myself and tell what he told me.

The Court: You got a subpoena on for him too.

Mr. Tolliver. I have.

The Court: And I saw that it was served too.

Mr. Tolliver: What I'm saying is that this business about having people come in to say what he said I don't see how that can be allowed.

[10] Mr. Ake: Your Honor, basically the Fifth Amendment does not protect any right here, and we're asking the Court after being permitted to show that he is a hostile witness to then impeach our own witness.

After further questioning by the judge, both Appling and the judge retired to chambers. Upon their return,

the judge recalled the jury and allowed Appling, without being sworn, to take the stand, identify himself and refuse to testify.

The state then questioned seven other witnesses concerning Appling. The district court, in the proceeding below, concluded that the state's questions "sought to suggest to the jury that Appling's testimony would have been helpful to the prosecution had he testified." Citing *U.S. v. Vandetti*, 623 F.2d 1144 (6th Cir. 1980), which discusses the constitutional problems that arise when the state is permitted to put a witness on the stand who will assert the Fifth Amendment, the district court stated:

> The entire line of questioning about Appling leads this court to conclude that Walker's right to a fair trial was grossly prejudiced by the suggestion that evidence was not being presented to the jury which would have established Walker's guilt.

The state now contends that since defense counsel did not object to the questions at trial, any claim of error has been waived. In fact, the state court of appeals appears to have applied a procedural bar to raising the issue on appeal.[9] We [11] cannot agree that this error is

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9. The court of appeals stated:

> The fifth assignment of error complains that the court erred in ordering a witness, John Appling, to testify and in permitting inquiries concerning him throughout the trial.
>
> An examination of the record shows that John Appling was called as a state's witness and refused to take an oath (R. 51). Whereupon the court excused the jury and conducted a lengthy examination of the witness (R. 52-62). Immediately, the jury was returned to the box whereupon the witness responded to questions giving his name and address and indicating that he refused to testify, whereupon he was excused and the jury recessed for a regular recess. We find no objection to any of these proceedings and none has been pointed out to us in oral argument to the briefs. Therefore the error, if any there was, is not cognizable upon appeal. See *State v. Gordon*, 28 Ohio St.2d 48.

not cognizable in this habeas proceeding. The record clearly indicates that defense counsel objected to the process whereby Appling would take the stand so that the prosecution could put other witnesses on to suggest that Appling had relevant testimony to bolster its case.

It is true that, absent a showing of cause and prejudice, *Wainwright v. Sykes*, 433 U.S. 72 (1977) precludes a federal court, as a matter of comity, from hearing an issue to which the state appellate courts applied a procedural bar. Yet, it must also be made clear that this rule is a matter of comity between the federal and state courts and should not be applied to preclude federal courts from hearing federal constitutional claims when to do so does no disrespect to the state courts and their procedural rules. *Jackson v. Cupp*, 693 F.2d 867 (9th Cir. 1982). Thus, in *Ulster County Court v. Allen*, 442 U.S. 140 (1979), the Supreme Court held that the *Sykes* rule does not apply when it is *not* clear that the state appellate court had applied a procedural bar. Furthermore, it is now well accepted that when the state appellate court ignores the state procedural default, the federal courts may also reach the merits on a habeas review. To do so does not denigrate the state procedural system. *Ulster County Court v. Allen*, 442 U.S. 140 (1979); *Hockenberry v. Sowders*, 620 F.2d 111, *reh. denied*, 633 F.2d 443 (6th Cir.), *cert. denied*, 450 U.S. 933, *reh. denied*, 451 U.S. 933 (1980); *Cook v. Bordenkircher*, 602 F.2d 117 (6th Cir. 1979); *Bell v. Watkins*, 692 F.2d 999 (5th Cir. 1982), *Burns v. Estelle*, 592 F.2d 1297 (5th Cir. 1979), *aff'd. en banc*, 626 F.2d 396 (1980); *Moran v. Estelle*, 607 F.2d 1140 (5th Cir. 1979); *Henson v. Wyrick*, 634 F.2d 1080 (8th Cir.), *cert. denied*, 450 U.S. 958 (1980); *Quigg v. Crist*, 616 **[12]** F.2d 1107 (9th Cir. 1980); *Brinlee v. Crisp*, 608 F.2d 839 (10th Cir. 1978); *cert. denied*, 444 U.S. 1047. *See also Martinez v. Harris*, 675 F.2d 51 (2d Cir. 1982).

We believe that when a state appellate court applies a procedural bar that has no foundation in the record or state law, the federal courts need not honor that bar.[10] We do not by this holding sanction blanket federal court review of state procedural rulings, rather the rule is to ensure that the state courts do not block federal vindication of federal constitutional rights by procedural rulings that have no basis in state law or the facts of the particular case.

In Ohio, the appellate courts will not entertain an objection on appeal that was not raised before the trial court "at a time when such error could have been avoided or corrected by the trial court." *State v. Gordon*, 28 Ohio St.2d 45, 50 (1971). The underlying rationale of this rule is the same as that in the requirement of F.R.C.P. 51; that "the court should be given an opportunity to correct a mistake or defect . . . when it can be accomplished during the same trial." *Presley v. Norwood*, 36 Ohio St.2d 29, 33 (1973). In *Presley*, the Supreme Court of Ohio held that the rationale used by the federal courts under F.R.C.P. 51

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10. We note the issue as to whether this Court can, consistent with *Wainwright v. Sykes*, reach the merits of an issue on habeas with no showing of cause and prejudice even when there is a technical state procedural bar. There appears to be confusion in this Circuit as to whether constitutional infirmities in state trials that are reviewable under state law fall outside the *Sykes* requirement. There is ample authority that when there is a plain error exception in state law, we can reach the merits absent any *Sykes* analysis, if the alleged infirmities amount to plain error. *Brewer v. Overberg*, 624 F.2d 51 (6th Cir.) *cert. denied*, 449 U.S. 1085 (1980); *Berrier v. Egeler*, 583 F.2d 515 (6th Cir.), *cert. denied*, 439 U.S. 955 (1978); *Rachel v. Bordenkircher*, 590 F.2d 200 (6th Cir. 1978); *Cook v. Bordenkircher*, 602 F.2d 117 (6th Cir.), *cert. denied*, 444 U.S. 936 (1979); *Krzeminski v. Perini*, 614 F.2d 121 (6th Cir. 1980). Yet, the holding in *Hockenberry v. Sowders*, 620 F.2d 111 (6th Cir. 1979) appears to be in tension with that authority. *See Hockenberry v. Sowders*, 633 F.2d 443 (6th Cir. 1979) (order denying rehearing) [especially the dissenting opinions of Judges Keith and Jones at 633 F.2d 445, 448]. Since we here find no adequate state procedural bar, we need not reach this issue.

was equally controlling for the state rule. It explicitly [13] adopted the rule that "once a party makes his position sufficiently clear to the trial court, the rationale for formally objecting to a charge given in disregard of that position is no longer present." *Id.* at 33, *citing, inter alia, Evansville Container Corp. v. McDonald,* 132 F.2d 80 (6th Cir. 1942); *Kentucky Trust Co. v. Glenn,* 217 F.2d 4262 (6th Cir. 1954); *Pleitz v. Garrison,* 413 F.2d 895 (8th Cir. 1969).

The state appellate court's holding that there is no evidence which shows that the defendant preserved the issue for appeal by objecting at trial has no foundation in the record. We need not engage in a microscopic-type search of the trial record to conclude that the trial judge was aware that there was a serious question raised as to whether Appling should testify. Moreover, it is clear that the trial judge knew that the defense objected to the proposed minuet which would have Appling take the stand, refuse to testify only to then allow the prosecution to admit other witnesses' views of what Appling might have said. The awareness is apparent given that the trial judge raised the first issue, as to whether or not Appling should take the stand at all, himself. He dismissed the jury and proceeded to question the witness. In light of this, there was obviously no additional need to make a formal objection. Further, the defense clearly did object to the entire scheme once it became clear that Appling would not testify. We do not find and therefore cannot say that there is any support for the view that the trial court did not have an opportunity to consider the issue and correct itself. To the contrary, from the record, the conclusion is inescapable that the court clearly decided the issue against the defendant.

We thus find that we need not honor the state appellate court's claim to procedural default. Its holding

is against the clear record and well-recognized state rule. While state application of its own rules of procedure would not be *reviewable* on habeas, the notions of comity that underlie the *Wainwright v. Sykes* rule do not require that we defer to applications of state procedural bars that have no foundation. There [14] is no foundation here. To hold otherwise without such a foundation would allow state courts, through erroneous rulings, to insulate federal constitutional questions from federal review.[11]

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11. We are well aware of the danger of a holding which would permit state prisoners to attack, in federal habeas actions, state appellate court applications of state procedural rules as a bar to the review of issues not raised at trial. To allow such a blanket rule would undo the cause and prejudice test enunciated in *Wainwright* and reaffirmed just last term in *Isaac v. Engle*, 50 U.S.L.W. 4859 (1982). *Cf. Hockenberry v. Sowders*, 633 F.2d 443 (6th Cir. 1980). Yet, the Supreme Court in *Ulster County, supra*, also made clear that the comity concerns underlying the *Wainwright* rule do not weaken the federal court's duty to vindicate federal constitutional rights. When, as here, the state essentially adopts the federal rule for procedural bars and it is clear from the record that the state appellate application of the procedural bar has no foundation, we believe the comity balance weighs most heavily on the side of not deferring to the obviously erroneous state porcedural bar.

The Fifth Circuit has recently stated that:

> the notion of comity which underlies the exhaustion doctrine must be understood not as a capitulation of federal power to state interests; rather, comity involves a delicate balance and compromise of both state and federal concerns. For as much as the unchanneled exercise of habeas corpus by the federal courts would disrupt the integrity of the state criminal process, so too would an unthinking subservience to state sovereignty render the time-honored Writ of Liberty sterile and nugatory. Comity requires sensitive accommodation, and not simply slavish adherence, to the interests of the states.

Carter v. Estelle, 677 F.2d 427, 442-43 (5th Cir. 1982). We are of the belief that it would be slavish adherence to state interests to fail to vindicate a state prisoner's constitutional rights under the guise of honoring a state procedural ruling that is without foundation.

Our position gains added support from the Fifth Circuit's view in *Rummel v. Estelle*, 587 F.2d 651 (5th Cir. 1978). There,

(Continued on following page)

Footnote continued—

the defendant had failed to raise an objection at trial to the application of the Texas habitual criminal statute. The Fifth Circuit rejected the argument that the petitioner was now barred from raising the issue on habeas with:

> Since it is apparent that the Texas Court of Criminal Appeals has repeatedly rejected Rummel-like challenges to the Texas habitual criminal statute, we are at a loss to see how any state interest would be served by demanding that Rummel make a futile gesture at his trial.

Id. at 653.

At least one other court has sought the need not to defer to an application of a state procedural bar when it appeared from the record to be without foundation. In *Thergood v. Tedford*, 473 F.Supp. 339 (D.C. Conn. 1978), the Court noted that even though the state had evidently applied the procedural bar, there had been an ample opportunity for the state courts to consider the issue and correct the defect. The Court also reported that "while it is true the petitioner did not use the precise term 'exception' in response to the court's adverse ruling on the question in issue here, his request to be heard outside the presence of the jury after the court ruled certainly connoted an objection to that ruling . . ." Believing that the petitioner had objected, the court decided the merits in the habeas proceeding.

Finally, the position we adopt here is not in conflict with *Hockenberry v. Sowders, supra.* There, this Court concluded that under *Wainwright*, the federal courts cannot make an independent application of the state's contemporaneous objection rule.

Hockenberry is significantly distinguishable. The contemporaneous objection rule there included the discretionary caveat that the state appellate court could ignore the procedural bar if manifest injustice resulted. This Court merely held that federal courts must, to some extent, defer to a state's assessment that the discretion to ignore the bar should not be exercised. Here, there is doubt as to the factual issue concerning whether or not there was an objection at trial. We do not invade upon the state's discretionary determination concerning its own procedural rule. Rather, we are deciding whether an erroneous factual determination by the state court in applying its nondiscretionary rule should bar federal relief.

That *Hockenberry* requires that we make an assessment as to whether the state procedural ruling is without foundation is clear from the Court's statement that "it is clear that the central question in such an instance is whether the state court denied petitioner's claim on *an adequate* and independent state procedural ground." *Id.* at 115. When the state court erroneously reads a clear record to find no objection by the defendant, the state ground cannot be said to be an adequate one. *See also* footnote 10, above.

[15] F. The Use of News Clippings.

The state repeatedly used newspaper clippings to "refresh the recollection" of defense witnesses regarding the "horrible conditions" at the jail. The defense witnesses in several instances clearly stated that they remembered nothing about the alleged incidents described in the newspapers, yet the state persisted in its line of questioning. The district court correctly found that the state was successfully putting the substance of the articles in evidence. At [sic] the district court stated:[12]

> **[16]** The danger of unfair prejudice to Walker is obvious. Newspaper articles about matters of substantial public controversy (*i.e.*, the jail's "horrible conditions," the prisoners' hunger strike "against medical facilities, bail procedures and overcrowding," Tr. 667, the public probe into the use of drugs by inmates, the destruction of commissary fund records and the state audit) when brought before the jury inhibited a dispassioned consideration of an accused's guilt or innocence. What Cuyahoga County did or didn't do in these matters could not be attributed to the defendant. It appealed to anti-Cuyahoga County provincialism at the expense of the defendant. This heavy baggage was added to the total irrelevance of this evidence on the issues to be decided by the trier of fact.

In justification, the state once again simply relies on the discretion of the state trial court. That is clearly not enough. A state trial judge cannot operate beyond the requirements of the United States Constitution by claiming discretionary authority. We agree with the conclusion of the district court that "parade[ing]" newspaper clippings before the jury in the manner done here con-

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12. App. 158.

stituted transgressions which "invaded the defendant's right to a fair trial." We reject these procedures as abhorrent and repugnant for their inflammatory and prejudicial effect upon the jury.

We need not determine whether each of the alleged errors would, alone, require that we find a deprivation of due process. It is clear that the cumulative effect of the conduct of the state was to arouse prejudice against the defendant to such an extent that he was denied fundamental fairness. The trial was inflamed by marginally relevant and irrelevant evidence that was highly prejudicial. The contrary contentions of the state are supported by neither controlling authority nor considerations of fairness and justice. By allowing the trial to focus more on the claimed corruption of the Sheriff's Department than on the issue of Walker's guilt or innocence, the trial court denied Walker due process of law in violation of the [17] Constitution. We therefore affirm the district court's grant of the writ.

Our close examination of the trial court record compels an additional comment. Such a trial as was conducted here is a reminder of the role the Great Writ must play in our jurisprudence. When a trial court permits the constitutional protections to be overridden by zealous prosecutors without interjecting restraining or curative measures, the federal courts must be alert to act as the district court did here. The methods utilized by the state to obtain this conviction, in the words of Justice Frankfurter, clearly "offend 'a sense of justice'." *Rochin v. California*, 342 U.S. 165, 173 (1952) *citing Brown v. Mississippi*, 297 U.S. 278, 285-6.

III

The remaining issue to be decided is whether the evidence against Walker is so insufficient as to preclude

a new trial. We must hold that under *Jackson v. Virginia*, 443 U.S. 307 (1979) and for the reasons set forth by the district judge, a new trial is not foreclosed.

The state placed Walker at the scene of the crime through testimony of (1) Davidson and Ogletree, accomplices to the crime, (2) Rene Clark, a disinterested eyewitness; and (3) Mabel Mack, wife of the deceased. The state also placed Walker outside of the jail during the relevant period through testimony of (a) Clarence Cash, who allegedly spoke with Walker at an "after hours" bar during June 1972, (b) James Curry, who allegedly spoke with Walker at a garage around mid-June, and (c) Mrs. Willie Mae Hart, who resided near the A&P store and who saw a brown automobile leave the scene of the crime driven by a black man with a bad complexion "similar to" Walker's.

The magistrate rejected the testimony of these individuals as follows: (1) Davidson and Ogletree were promised leniency, and two witnesses testified that Ogletree named Walker [18] because Walker was sleeping with Ogletree's wife; (2) Rene Clark had earlier identified another suspect in a lineup in which Walker participated; (3) Mrs. Mack said only that Walker "looked like" the killer; (4 and 5) Clarence Cash and James Curry had logical inconsistencies within each of their accounts; and (6) Mrs. Hart specifically stated that she was not saying Walker was the man she saw.

The district court held that the magistrate had erred by weighing the testimony and failing to view the evidence in the light most favorable to the prosecution. Since credibility is not a matter of review for a federal habeas corpus court, *Pigford v. United States*, 518 F.2d 831, 836 (4th Cir. 1975), and since the testimony of the state's witnesses, if believed, would provide sufficient evidence

to support the conviction, the court concluded that Jackson did not preclude retrial.

> Walker's main objection to this conclusion is as follows: Rather than a selective review of the prosecution's case, Jackson requires that all the evidence be weighed so as to ascertain whether any rational trier of fact could find guilt beyond a reasonable doubt.
>
> • • •
>
> No matter how favorably the prosecution's case may be viewed, no rational mind could accept the testimony of Ogletree and Davidson over the unsolicited and independent testimony of [certain witnesses for defendant].

This argument must fail since it merely urges this Court to weigh the credibility of the witnesses. This we cannot do. We agree that, from the record, the witnesses for Walker appear more credible than those for the state, and if we were jurors, we might be inclined to vote to acquit in this case. But the inquiry as to sufficiency of the evidence does not require or permit a court "to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt." *Jackson*, 443 U.S. at 319. Looking at the case in the light most **[19]** favorable to the prosecution appears to mean resolving creditability conflicts in favor of the prosecution. *Compare Jackson*:

> a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.

We believe the district court was correct in its conclusion that retrial is not precluded by *Jackson*. Therefore, the grant of the writ and the order granting the state 120 days to retry Walker is AFFIRMED.

[20] BROWN, *Senior Circuit Judge*, concurring in the result.

I concur with the panel opinion that this habeas petitioner, Walker, was denied federal due process by allowing into evidence a great deal of totally irrelevant and highly prejudicial evidence. I recognize that such rulings on evidence must be egregious to amount to constitutional error, but this is such a case. I also agree with the panel opinion that, however, the state introduced enough evidence of guilt to allow the state to try Walker again.

On the other hand, I am concerned that the panel opinion, in dealing with "The John Appling affair" (slip at .....), assumes that there is a problem in the area of *Wainwright v. Sykes*, 433 U.S. 72 (1977) and uses this as a springboard for the *tour de force* that follows. In the course of this rather extended discussion, the opinion suggests, *inter alia*, that a federal habeas court may, under *Wainwright*, reach the merits of an issue where no cause and prejudice is shown, where there is a "technical state procedural bar" and there is "plain error." (Slip at ....., n. 10.) In fact, however, there simply is no *Wainwright* problem to be dealt with at all.

While it is true that the Ohio Court of Appeals did (App. at 6) rely on the failure of defense counsel to object to the procedure whereby Appling was placed on the stand before the jury and claimed his immunity not to testify, it did not rely on any alleged failure to object to questions put to other witnesses calculated to suggest to the jury that Appling's testimony would have been favorable. The

Ohio Supreme Court also did not rely on an alleged failure to object to the testimony of these other witnesses in reaching its decision. Moreover, respondent below, Engle, does not rely in his brief here on any such alleged failure to object to the testimony of these other witnesses. It is this testimony that Walker complained about in district court and in this court. This part of the panel's opinion is dictum and totally unnecessary.

OPINION OF THE UNITED STATES DISTRICT COURT

(Filed January 28, 1981)

C79-2132

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RAYMOND WALKER,
Petitioner,

v.

TED ENGLE,
Respondent.

MEMORANDUM AND ORDER

(Filed January 28, 1981)

THOMAS, J.

Guy Mack, an off-duty detective on the Canton City Police Department, was shot and killed during a robbery on July 22, 1972 at an A&P Supermarket in Canton, Ohio. At the time, Mr. Mack was off duty shopping with his wife.

The composite evidence of store employees and Warren Davidson and Fred Ogeltree shows that the robbery was committed by four men, three who entered the store, and one (Davidson) who remained outside the store. In 1973 Warren Davidson and Fred Ogeltree were convicted as aiders and abettors in the robbery and homicide and sentenced to life imprisonment. Neither, however, was the triggerman.

In late 1975, while incarcerated at the Southern Ohio Correctional Facility in Lucasville, Ogeltree and Davidson contacted Stark County authorities through a local attorney, Harry Schmuck. They implicated Raymond Walker as the triggerman in the homicide. Bennett, said by Ogeltree and Davidson to have participated in the robbery, was never apprehended.

[2] At petitioner's trial, Davidson and Ogeltree were able to identify the fourth man only by the name "Bennett." In return for their testimony against Walker, a recommendation of leniency was made to the Governor by Stark County authorities.

Walker was indicted on March 12, 1976. The first trial ended with a hung jury. At his second trial he was convicted of first degree murder in violation of former Ohio Revised Code §2901.01. His conviction was affirmed by the Fifth District Court of Appeals in June 1977. Walker appealed to the Ohio Supreme Court which, in a divided vote, affirmed his conviction. *State v. Walker*, 55 Ohio St. 2d 208 (1978). On April 23, 1979, the United States Supreme Court denied Walker's petition for a writ of certiorari. *Walker v. Ohio*, 441 U.S. 924 (1979).

In November 1979, Walker filed a petition for a writ of habeas corpus under 28 U.S.C. §2254. The petition listed three grounds for relief. The first asserts that the

appellate courts in Ohio affirmed his conviction upon a constitutionally deficient standard of review. The second asserts that under the standard of review enunciated in *Jackson v. Virginia*, 443 U.S. 307 (1979), no rational trier of fact upon the evidence of record could have found Walker guilty of the Mack [3] homicide beyond a reasonable doubt.[1] The third ground lists numerous prejudicial trial errors, mainly in the admission of irrelevant and inflammatory testimony, which, cumulatively considered, denied Walker a fair trial.

The Magistrate has filed a 108-page Recommended Report and Decision concluding that on all grounds the petition be granted and that "an order [be] entered discharging Raymond Walker from further confinement." In a lengthy factual review of petitioner's trial transcript, the Magistrate concluded that petitioner was denied a fair trial in violation of the due process clause of the Fourteenth Amendment. For the reasons set forth in Part I of this memorandum, this court independently reaches the same conclusion. The trial court permitted the introduction of testimony so irrelevant, prejudicial and inflammatory that it "undermined the integrity of the fact finding process and a fair determination of the principal fact in issue," that is, Walker's alibi defense. (*See* Habeas Corpus Petition, p.2.) The trial errors "offend a sense of justice," *Rochin v. California*, 342 U.S. 165, 173 (1952), and cannot be considered harmless beyond a reasonable doubt. *See Chapman v. California*, 386 U.S. 18 (1967).

The Magistrate also concluded that Walker should be granted an unconditional discharge and the state should not be permitted to retry him because under [4] *Jackson*,

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1. Since petitioner's first ground assumes that the *Jackson* standard should have been applied by the Ohio appellate courts, it merges with this court's consideration of the *Jackson* standard in Part II of this memorandum.

"no rational trier of fact could have found proof of guilt beyond a reasonable doubt." For the reasons set forth in Part II of this memorandum, this court disagrees. It is concluded that *Jackson* neither requires nor permits such a judgment and resulting freedom from retrial if the prosecution so elects. Apart from the prejudicial evidence, the prosecution produced sufficient other evidence which, viewed in the light most favorable to the prosecution, would permit a reasonable trier of fact to find Walker guilty beyond a reasonable doubt.

I.

At the second trial, Walker's defense was that he could not have committed the Mack homicide at the A&P store in Canton, Ohio on July 22, 1972 because he was incarcerated in the Cuyahoga County jail.

Walker was indicted on February 22, 1972 for attempted burglary. At his arraignment on April 14, 1972, he pled not guilty; and bail was set at $5,000. He was, however, unable to secure a bond for his release; and Cuyahoga County Court records indicate that he was then incarcerated from April 14 until August 1, 1972 when the attempted burglary charges were dismissed.

A review of the transcript of Walker's trial reveals that the trial judge considered Walker's alibi defense to place the "character" of the Cuyahoga County Sheriff's Department on trial. The Ohio Supreme Court, in affirming Walker's conviction, stated that Walker

> **[5]** having offered the records as proof of the truth therein stated, as well as proof [sic] the facts reasonably to be inferred therefrom . . . placed in issue the credibility generally of the records, the record making process and the record keepers.

55 Ohio St. 2d at 214.

An elementary rule of evidence, both under Ohio and federal law, is that matters offered in evidence must be relevant to the issues of the case and that evidence which is wholly irrelevant, that is, incapable of affording any legitimate presumption of inference as to a fact in issue, should be excluded. Under Ohio law, relevant evidence is "any matter of fact the effect, tendency, or design of which, when presented to the mind, is to produce a persuasion concerning the existence of some other matter of fact—a persuasion either affirmative or disaffirmative of its existence." *Barnett v. State*, 104 Ohio St. 298, 306, 135 N.E. 647, 650-51 (1922). Thus, where a fact "has a causal connection or logical relation to another fact so as to make the other fact either more or less probable, the first fact is competent or is relevant to prove the second. . . ." *Id.*, at 306, 135 N.E. at 650. This is the standard the court shall utilize in assessing the prejudicial effect of the trial court's evidentiary rulings.[2]

States are afforded wide latitude in fashioning and applying their own rules of evidence and criminal **[6]** procedure. *Manning v. Rose*, 507 F.2d 889, 892 (6th Cir. 1974). Therefore, claimed trial errors relating to the admissibility of evidence are matters of state law and not generally subject to redress in habeas corpus cases. But

> where the trial errors or irregularities infringe upon a specific constitutional protection or are so prejudicial as to amount to a denial of due process . . . a justiciable federal issue is presented in a habeas corpus proceeding.

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2. A similar definition prevails under federal law. "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Fed.R.Evid. 401.

Atwell v. Arkansas, 426 F.2d 912, 915 (8th Cir. 1970); *Maglaya v. Buckhoe*, 515 F.2d 265, 268 (6th Cir. 1975). In *Maggit v. Wyrick*, 533 F.2d 383, 385 (8th Cir. 1976), the court reviewed various formulations of this due process standard:

> In order to establish a denial of due process the petitioner must prove that the asserted error was so "gross", *Taylor v. Minnesota, supra* at 1121, "conspicuously prejudicial", *United States ex rel. Cannon v. Maroney*, 373 F.2d 908, 910 (3d Cir. 1967), or otherwise of such magnitude that it fatally infected the trial and failed to afford petitioner the fundamental fairness which is the essence of due process. *Lisenba v. California*, 314 U.S. 219, 236, 62 S.Ct. 280, 289, 86 L.Ed. 166, 179 (1941). In making this determination courts must review the totality of the facts in the case pending before them and analyze the fairness of the particular trial under consideration. *United States ex rel. Bibbs v. Twomey*, 506 F.2d 1220, 1223 (7th Cir. 1974). . . .

In the Fifth Circuit the standard is whether the prejudicial evidence is "material in the sense of crucial, critical, highly significant." *Corpus v. Beto*, 469 F.2d 953, 956 (5th Cir. 1972), *quoting Lawrence v. Wainwright*, 445 F.2d 281, 282 (5th Cir. 1971). No precise rule can be laid down. This court is convinced, however, that under any of the above due process formulations, the admission of highly prejudicial testimony that had no bearing on the elements of the state's case **[7]** or on Walker's alibi denied him due process of law. The injection of testimony dealing with the following matters, cumulatively considered, was fundamentally unfair to the defendant and fatally infected the fairness of his trial.

A.

The fact of a criminal conviction of "Major" [Edward] Paine was brought before the jury over the strenuous objections of defense counsel. Paine had been the Warden of the Cuyahoga County jail. Although the dates of his employment there are not exactly clear, it appears that he was a jail official before and after, but not during, Walker's claimed confinement. The prosecutor was permitted to question two defense witnesses about Paine's conviction. Frank Urankar, a deputy sheriff at the jail, testified that Paine was not associated with the jail in the summer of 1972 but rather "came back just a little bit before the election in October or November, '72." The prosecutor pressed on:

Q: And then, Major Paine came in around November you believe?

A: He came in with Sheriff Kreiger in '69 and he was with us for few years and then he left.

Q: Did he come in as a major?

A: He was the warden when he came in.

Q: He started at the top in other words, right?

A: He was—

Mr. Tolliver: Object to relevancy.

The Court: Overruled.

[8] A: He was a major when he left and when he came back. If I'm correct—I can't remember.

Q: He's no longer with the Sheriff's Department now is he?

A: No, sir.

Particularizing the questioning:

Q: As a matter of fact he's not with the Sheriff's Department because he was indicted and found guilty of—

Mr. Tolliver: Object, judge.

Q: [T]heft of property, isn't that true?

Mr. Tolliver: Objection.

The Court: Overruled.

A: He was indicted right.

Q: And he was found guilty?

A: He was found guilty.

Q: Of theft of property from the jail?

A: Property of the jail?

Q: Is that true?

A: I think it was something about two guns that were missing.

Q: What was it evidence?

Mr. Tolliver: Continuing objection, judge, relevancy.

The Court: No, it's very relevant in this case. Overruled.

A: Probably was the evidence. I don't know.

Steven Popovich, who had worked with Urankar as a corporal in jail security, was similarly questioned.

This testimony bore no relevance to the state's case or any issue concerning the accuracy of jail records or record keeping procedures or, more generally, to the reliability of jail security. Contrary to the trial judge's on-the-record

conclusion that Paine's [9] conviction was "very relevant in this case," it had no tendency, to make the truth or falsity of Walker's alibi more or less probable than it would be without the evidence. Paine's conviction was not an element of the crime for which Walker was charged. Nor does the fact of that conviction make more or less probable any fact bearing on jail security (which would be pertinent to Walker's alibi) or the credibility of jail personnel responsible for jail security during Walker's claimed incarceration. Its sole purpose and clear effect was to prejudice the jury's consideration of Walker's alibi.

B.

The State Auditor's Rebuttal Testimony

As part of Walker's defense, his jail commissary records, as well as testimony from several jail deputies concerning those records, were introduced for the purpose of showing numerous transactions in his account. The commissary records were circumstantial evidence that Walker was in jail on the dates of the transactions in his account. The probative value of those records was undermined, however, by testimony elicited by the prosecution's cross-examination of various jail deputies that inmates other than Walker could easily have made the purchases in his commissary account.

The prosecution did not stop with this proper and permissible impeachment. In a transparent attempt to show general financial corruption in the Cuyahoga County Sheriff's Department, the prosecution, with [10] court permission, called Frank Lancianese, an examiner for the Office of the State Auditor, as a rebuttal witness. He testified, over the strong objection of defense counsel, that an audit of the Sheriff's Department revealed a

shortage of $66,000 in commissary account funds between January 1969 and October 1975 and that the State Auditor's Office had encountered "obstacles" from the Cuyahoga County Sheriff's Department in gaining access to commissary records.[3] The examiner was permitted to go into detail concerning the Sheriff Department's financial accounting methods. This had nothing to do with jail security or record keeping procedures related to the jail population. Nor did the auditor's report on commissary funds relate to the issue raised by Walker's use of the commissary records as circumstantial proof that Walker was present in the jail to make the transactions in his account.

The Examiner's testimony went even farther afield when he was questioned, over objection, about the possible misuse of jail vending machine profits. He testified that there was approximately $9,000 of vending machine commissions unaccounted for by the Sheriff's Department. In addition, he was permitted to testify that the use of some of the accounted for vending machine profits was in violation of Ohio law.

[11] The admission of the state examiner's testimony,[4] like that of "Major" Paine's conviction, bore no relationship to the state's case or issues raised by Walker's alibi defense. It was wholly extraneous, highly prejudicial and calculated to sway the jury's consideration of Walker's alibi on a basis that "smacks of guilt by association."

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3. The examiner testified over objection that the Auditor's Office was able to gain possession of only some jail commissary records by a state court action.

4. Other witnesses were also questioned about the Examiner's audit. Sergeant Frank Urankar was asked if he knew "that certain commissary records were burned before the audit. . . .?" He answered, "No, sir" before defense counsel could appropriately object with, "What's this got to do with Raymond Walker?" *See also* the cross-examination of Steven Popovich (Tr. 737).

(Mag. 94.) Indeed, that this was the purpose is apparent from the prosecutor's final argument:

> We have brought the records to you concerning the audit of the sheriff's department for one reason alone. To show you that all the thieves and the bad people weren't on the inside of the jail; that if you lie and steal what says you won't let a prisoner out for a weekend or a few days. You know, there's a saying in the computer business that you put garbage in you get garbage out. That's what you have in those records.

C.

Further putting the Cuyahoga County Sheriff's Department and jail in a bad light that undoubtedly inflamed the jury, the prosecution was permitted, without any basis in the record, to insinuate that the testimony of several defense witnesses was being coached by a member of the Cuyahoga County Sheriff's Department. Sergeant Frank Urankar was cross-examined as follows:

Q: Do you know a man by the name of Tom Booth?

A: Tom Booth?

Q: Yes.

[12] A: Yes.

Q: And he's a detective with the Cuyahoga County Sheriff's Department is that true?

A: Yes, sir.

Q: And were you down here Friday?

A: Yes, sir.

Q: And was Tom Booth down here Friday?

A: Yes, sir.

Q: And during the conduct of this trial where was Tom Booth?

A: He was in this room.

Q: Had he been subpoenaed as a witness?

A: No, sir.

Q: He was down here on his own time?

A: That's right. That's what he told me.

Q: And did he also tell you that he came down because he had never seen a trial before?

At this point defense counsel objected "to all this. . . ."

The Court: Overruled.

A: He didn't say that to me.

Mr. Tolliver: Note my exception.

Q: Do you know why he came?

Mr. Tolliver: Objection.

The Court: Overruled.

A: No, sir.

Q: And were you aware that he was taking notes in the courtroom?

Mr. Tolliver: Objection, Judge.

The Court: Overruled.

Mr. Tolliver: That's a fact not in evidence.

A: No, sir. After I—he came out and he said he was called into the chamber by the judge and he

told me that the judge asked him why he was here and what was he doing in court. That's all I know.

[13] Q: But you also know that during every recess prior to that time he came out of the courtroom and he had conversations with all of you didn't he?

Again Mr. Tolliver objected, "Judge, note my continuing objection."

The Court: Overruled.

A: We talked to him but he didn't say nothing about the trial.

Q: What did he talk about?

Mr. Tolliver: Objection.

The Court: Overruled.

Mr. Tolliver: Man's down here on his own time.

A: I didn't know anything about that. I have to come down until last Thursday when I got the subpoena. I didn't even know what this case was about.

These same insinuations were made during the cross-examination of Lawrence Pullin, a security sergeant at the jail. The Magistrate's conclusion with regard to this testimony bears repeating:

> The examination of Mr. Urankar and Mr. [Pullin] concerning the presence of Mr. Booth in the courtroom was completely improper. It was designed to convey to the jury the impression that the trial was being monitored by the office of the Sheriff of Cuyahoga County, with an implication of impropriety, and that the defense witnesses were being coached by Mr. Booth. This was a public trial and all citizens, including Mr. Booth, were entitled to attend. If the

prosecution had any reason to believe that Mr. Booth's presence in the courtroom was violative of any court order or rule the matter should have been presented to the court without the jury being present and with Mr. Booth being called to the witness stand (not the judge's chambers) to explain his presence and conduct. It should not have been dragged before the jury with unproven inferences and innuendos adverse to the defense.

D.

In a further effort to disparage Cuyahoga County authorities, a rebuttal witness of the prosecution [14] was permitted to speculate about the delay in bringing Walker to Stark County for trial. Canton Police Sergeant William Newkirk was asked:

Q: When were you able to locate Raymond Walker?[5]

Mr. Tolliver: Objection, judge.

The Court: Overruled.

A: First time he was actually located was in May of 1975 when it was—he [was] picked up in Chicago, Illinois. That was on the capias out of Cuyahoga County.

Q: Did—were you able to bring him to Stark County as a result of that?

A: No, we weren't. We weren't able to get him back to Ohio due to the fact that—

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5. Newkirk testified that Stark County authorities had been looking for Walker as a suspect in the A&P store robbery and homicide since early 1973.

Mr. Tolliver: Objection to this, judge. Supposed to be rebuttal.

The Court: Overruled.

A: Due to the fact that either Cuyahoga County would not extradite on their capias or Illinois wouldn't permit them. I'm not sure as to this day why it happened.

Q: Did you take that to the FBI?

Mr. Tolliver: Objection, judge.

The Court: He may answer yes or no.

A: Yes.

Q: Make any attempt to have the FBI extradite?

Mr. Tolliver: Objection.

The Court: Yeah. That's sustained.

Once again the jury was presented with a highly irrelevant and unsupported insinuation, creating more prejudice, **[15]** that Cuyahoga County authorities impeded Walker's extradition from Illinois to Stark County. Although Newkirk stated that he was "not sure to this day why it happened," the implication was clear: Cuyahoga County authorities had something to hide by impeding extradition. With the accused's rights hanging in the balance, the jury should not have received such prejudicial conjecture. It impaired the jury's perception of the defendant and his alibi defense.

E.

The John Appling Testimony

As part of its case-in-chief, the prosecution called John Appling to the stand. Appling was currently serving a nine to fifty-five year sentence at the Chillicothe Cor-

rectional Institution, but in 1972 he had been incarcerated at the Cuyahoga County jail and had served as a "range boss" of the cell block to which Walker was assigned on the fifth floor of the jail. Appling refused to be sworn, stating, "I don't want to testify." The judge excused the jury and proceeded to question Appling on his refusal to testify.

Q: Is there a reason for not testifying in this case?

A: I don't know nothing about it.

Q: You know nothing about it. And you do not want to be under oath and make that statement to the jury?

A: I don't want to even be here.

Q: Are you invoking the Fifth Amendment you don't want to testify in regards to it might incriminate you?

[16] A: Yes.

Q: And that is your statement, sir. Will you please tell me that is your statement, sir?

A: Taking the Fifth Amendment.

Q: It's not whether you want to testify, sir. I'm asking you is the reason for not testifying is because you are invoking the Fifth Amendment?

A: Yes.

The prosecutor stated to the court that Appling had knowledge of certain Cuyahoga County jail activities, that he had himself been allowed to walk free from the jail, and that he had seen Walker outside of the jail when Walker should have been confined.[6] After an in-chambers

6. Walker's counsel disputed the contention that Appling's testimony would be as the prosecutor anticipated, stating instead that it would be favorable to Walker's defense.

(off the record) conversation between the trial judge and Appling, the jury was recalled. Appling took the stand without being sworn. He was permitted to state his name and that he was presently located at "Chillicothe Correctional in transit to Lucasville." He was asked by the court, "Alright, and you refused to testify, is that right, sir?" He answered, "Yes."

This was not the last the jury heard of John Appling, however. The prosecution questioned seven other witnesses about Appling. Ricardo Brown (the acting jail warden in 1972) was asked if Appling was confined in the Cuyahoga County jail between April 14 and August 1, 1972. He answered, "I believe he was." Willie Hightower, a jail inmate testified on cross-examination that Appling [17] was a "range boss" on the fifth floor. The prosecutor's questions were clearly designed to show that Appling enjoyed a special status and privileges in the jail:

> Q: And the man that they pick for the range boss is usually the man that's got some control over the prisoners, right?
>
> A: Yea.
>
> Q: And he's someone that the other prisoners look to, right?
>
> A: Yes.
>
> Q: And when they got problems with the deputies they kind of go to the range boss and he works it out for them right?
>
> A: No, they don't work that like that. The only thing a range boss can do is the guard come and ask the guys for phone calls or do some work. He picks out who he wants to pick out, but he can't do nothing like that.

Q: Doesn't the range boss also back in there keep people under control?

A: Yeah, but they don't have to.

Q: That's why he gets to be the range boss isn't it?

A: Yes.

Q: Because he's the man?

A: Yes.

Hightower, after denying that Appling received special visiting privileges with his wife, stated

A: The least you can do as a range boss as far as getting something from a guard would be [to] get extra phone calls and maybe get over visits, and like downstairs with visiting privileges or like talking through this gate they got up there. They let you sit down at a table downstairs instead.

Another defense witness, "Stretch" Myers, who had been incarcerated with Davidson and Ogeltree at Lucasville, testified for purposes of showing that [18] Davidson and Ogeltree were attempting to frame Walker. On cross-examination, the prosecutor returned to the familiar theme of John Appling:

Q: Now, you rode back in the car from Lucasville with a man named Appling didn't you?

A: Yes, sir.

Q: Did you have any conversation with him?

A: Yes.

Q: Did you have any conversation with him about what would happen to him when he got to Lucasville?

A: John Appling?

Mr. Tolliver: Objection.

The Court: Overruled.

Q: Yea.

A: John Appling weighs two hundred and sixty pounds. There's not going to be much happen to him.

• • • •

A few questions later:

Q: Did you say anything to him about the—if he plays it right that he can have a nice job when he's down there?

Mr. Tolliver: Objection, Judge. Conversation between him and somebody else.

The Court: Overruled.

Mr. Tolliver: And that somebody else hasn't—

The Court: Just a minute. Overruled. You may answer Mr. Myers.

A: Would you repeat the question please?

Q: Did you say anything about arranging if he testified right or didn't testify or whatever that you could arrange a job.

A: I did not do any talking. He did the talking.

Q: Nothing was mentioned about a job at Lucasville?

[19] A: You mean could I give him a job? I'm in nc position. I can't give you a—that's foolish.

Q: Trustees have no control over jobs and people in various offices and in the jail?

A: Trustees? Trustees at Lucasville. There are no Trustees.

Q: Whatever. Prisoners have absolutely no control over who does what in Lucasville?

A: That's correct. They have a personnel department and that's it.

Q: Prisoners work in the personnel department?

A: Yes. I do.

Q: You work in a personnel department don't you?

A: True.

Q: And what's your job in the personnel department?

A: My responsibilities are midnight counts, also payroll and A.W.O.L.'s, etc. They have a committee who does the hirings of six people from the administration. They vote whether you go to work. They vote whether you don't.

The prosecutor's questioning of Hightower permitted the jury to infer that one of defendant's witnesses may have offered a job to Appling to persuade him not to testify. But more than that, the prosecutor's questioning of witness after witness about John Appling obviously sought to suggest to the jury that Appling's testimony would have been helpful to the prosecution had he testified and not asserted his Fifth Amendment privilege. As the Magistrate stated:

> This tactic was, in all probability, more beneficial to the prosecution than if Mr. Appling had actually testified. First, Mr. Appling appears before the jury as a mystery man, refusing to testify. Next, the jury discovers that not only was he in jail when Raymond Walker was supposed to have been there (special note

taken of July 21, 1972), but that he was the range boss, the "main man" of Mr. Walker's cell block. Then the suggestion is planted that Mr. Appling had been promised **[20]** some benefit for not testifying. The obvious conclusion to be drawn by the jury is that the prosecution tried to present evidence which would have been harmful to Mr. Walker's defense and was thwarted in that effort. All the while the prosecution was aware that Mr. Appling had stated to the judge that he knew nothing pertinent to the case and that defense counsel had represented that the night before Mr. Appling appeared in court he had stated he was not going to testify in the manner which the prosecution believed he might.

(Mag. 47.)

In *United States v. Vandetti*, 623 F.2d 1144 (6th Cir. 1980), the court discussed the constitutional problems associated with permitting the prosecution to put a witness on the stand who will assert a Fifth Amendment privilege. The court cautioned that at the least it carries a "potential for unfair prejudice" and should be allowed only "where the prosecutor's case would be seriously prejudiced by a failure to offer him as a witness. . . ." Two constitutional protections are impinged upon by the practice:

> [First,] such a witness permits the party calling the witness to build its case out of inferences arising from the use of the testimonial privilege, *Namet v. United States*, 373 U.S. 179, 186 (1963), a violation of due process.
>
> • • • •
>
> Second, calling such a witness encroaches upon the right to confrontation. *Douglas v. Alabama*, 380 U.S. 415, 419 (1965). Inferences from such a refusal

> may "add critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudic[e] the defendant." *Namet v. United States, supra,* 187.

Id., at 1148.

Vandetti's rationale applies here. The repeated questioning of witnesses, over objection, about Mr. Appling, after he had refused to testify, was "intended to build **[21]** [the prosecution's] case out of inferences arising from the use of the testimonial privilege." Since Mr. Appling refused to testify, it was impossible for the defense to refute the suggestion obviously being made to the jury by the prosecution, *i.e.,* that it had "tried to present evidence which would have been harmful to Mr. Walker's defense and was thwarted in that effort." (Mag. 47.) The entire line of questioning about Appling leads this court to conclude that Walker's right to a fair trial was grossly prejudiced by the suggestion that evidence was not being presented to the jury which would have established Walker's guilt.

F.

Finally, the repeated use of newspaper clippings by the prosecutor to "refresh the recollection" of numerous defense witnesses as to events extraneous to Walker, and the charge against him deeply invaded the defendant's right to a fair trial. Frank Urankar was cross-examined by the prosecution about a prisoner strike in July 1972 and the "horrible conditions" at the jail which prompted investigations by county commissioners and other community groups.[7]

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7. All of these matters are of doubtful relevance to Walker's alibi and easily susceptible to creating a prejudicial effect upon the jury.

Q: Just for a couple of days? And didn't even the county commissioners come down to that jail and community groups come into that jail because of the horrible conditions?

Mr. Tolliver: Objection, Judge. What's this got to do with Raymond Walker?

[22] The Court: Overruled. If he's familiar he can answer.

A: Well, conditions are better today.

Q: Sir, I'm going back to 1972. My question was do you recall when during 1972 specifically the month of July the county commissioners came into that jail as well as some common pleas judges and community groups?

A: I didn't see any county commissioner on my shift or any judge on my shift in the jail.

Q: Were you aware of their coming into that jail whether they were in on your shift or not?

A: No, sir.

Q: Did you read the newspapers?

Mr. Tolliver: Objection, Judge.

The Court: Overruled.

A: Like I said I didn't see any county commissioners or any judge in the jail.

Q: Did you read the newspapers?

A: This was four years ago.

Q: Did you read the newspapers four years ago?

A: Yes.

Mr. Tolliver: Judge, objection to this.

The Court:. Overruled.

(State's Exhibit 17 and 18 marked by the Reporter)

Mr. Tolliver: (At the Bench Outside of the Jury's Hearing) My further objection would be that these were taken during the daytime, not when he was working.

The Court: Ask the question first.

Q: Sir, I'm going to show you what's been marked for the purpose of identification as State's Exhibit Eighteen and ask you to examine that and state whether you recognize it and if so as what?

A: Well, I told you before.

Q: Sir, my question is do you recognize that?

A: I remember a hunger strike because of medication complaints. I see plumbing and overcrowding. **[23]** I told you without questioning that they were sleeping on the floors; that the jail was overcrowded. I knew about that.

The prosecutor again paraded newspaper clippings before the jury to "refresh the recollection" of Steven Popovich about a drug probe at the jail. Objections were lodged and overruled by the trial judge, who stated, "I'm just permitting him only to use it to refresh his memory, that's all." But subsequent questioning by the prosecutor demonstrates that he was (successfully) putting the substance of the articles in evidence before the jury.

Q: Do you remember anyone denying the use—that the investigation turned up anything to substan-

tiate charges that drugs were being used in the county jail?[8]

Mr. Tolliver: Objection.

The Court: Overruled.

A: No, not according to that [i.e., the news article].

Q: You don't—you didn't. Well, let me ask you to read paragraph two and see if that refreshes your memory.

Mr. Tolliver: Objection, judge.

* * * *

Q: Does that refresh your recollection?

A: According to what the paper says.

* * * *

Q: Do you remember also that those [commissary] records were burned?

Mr. Tolliver: Objection.

The Court: Overruled.

[24] A: No, I don't remember anything about that.

Q: Take a look at that and see if that refreshes your recollection at all concerning that.

Mr. Tolliver: Note my continuing objection, Judge.

The Court: This is just being used to refresh the memory only.

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8. Once again the subject matter of the questioning bears no relevancy to Walker's alibi.

Although any document, including a newspaper article, may be used to refresh a witnesses' recollection, the manner in which they were used before the jury tended to inflame them. The prosecutor went out of his way to let the jury know that events at the jail had made newspaper headlines. (*See* Tr. 665-67, 734, 881.) The examination could not have been more effective (or prejudicial) had the prosecutor simply read the complete news articles to the jury.

The danger of unfair prejudice to Walker is obvious. Newspaper articles about matters of substantial public controversy (*i.e.*, the jail's "horrible conditions," the prisoners' hunger strike "against medical facilities, bail procedures and overcrowding," Tr. 667, the public probe into the use of drugs by inmates, the destruction of commissary fund records and the state audit) when brought before the jury inhibited a dispassioned consideration of an accused's guilt or innocence. What Cuyahoga County did or did not do in these matters could not be attributed to the defendant. It appealed to anti-Cuyahoga County provincialism at the expense of the defendant. This heavy baggage was added to the total irrelevance of this evidence on the issues to be decided by the trier of fact.

[25] G.

Based upon the above analysis,[9] this court concludes that Walker did not receive a fair trial. The record is

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9. The Magistrate also utilizes the prosecutor's final argument as a basis for finding the due process violation. Defense counsel objected only to the prosecutor's final argument concerning the testimony of Mabel Potts. The final argument was not raised on appeal and is not presented as a basis for relief in Walker's petition. It is therefore not appropriately considered as a basis for relief by this court. *See generally, Jackson v. Denno*, 378 U.S. 368 (1964); *Wainwright v. Sykes*, 433 U.S. 72 (1977). The court has reviewed the trial errors attributed to conduct of the trial judge and does not believe they merit independent consideration.

replete with testimony on irrelevant matters of substantial prejudice to Walker's defense. Gambling, drugs, prisoner strikes, possible financial corruption, a conviction of a third party for theft from office, and insinuations about the coaching of testimony and efforts to hinder Stark County's prosecution of Walker produced a trial atmosphere substantially susceptible to prejudice and wholly at odds with traditional notions of fair play and justice. Petitioner's third ground for relief is therefore granted. We turn then to petitioner's challenge to the sufficiency of the evidence.

II.

A.

Jackson v. Virginia

Prior to the Supreme Court's decision in *Jackson v. Virginia*, 443 U.S. 307 (1979), federal courts applied the "no evidence" standard of *Thompson v. Louisville*, 362 U.S. 199 (1960) when ruling on a habeas corpus **[26]** petition asserting that a criminal conviction rested upon a lack of evidence. Strictly speaking, *Thompson* was not concerned with the sufficiency or weight of evidence to support a conviction, but only with whether the conviction "rests upon any evidence at all." 362 U.S. at 199. The court held that a conviction based upon a record wholly devoid of any relevant evidence of an essential element of the offense violated due process of law. Hence, only where there was "no evidence" supportive of guilt beyond a reasonable doubt on each of the essential elements of the crime was there a constitutional violation entitling a petitioner to relief. The "no evidence" standard did not involve the notion of weighing the sufficiency of evidence justifying conviction.[10]

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10. As stated by Chief Justice Warren, in *Jacobellis v. Ohio*, 378 U.S. 184, 202 (1964) (dissenting), "A mere modicum of evidence may satisfy a 'no evidence' standard."

In re Winship, 397 U.S. 358 (1970), however, seriously eroded the due process underpinnings of the "no evidence" standard. *Winship* dealt with the sufficiency of evidence required under due process to support a conviction. It held that due process protected an accused against conviction "except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the accused] is charged." 397 U.S. at 364.

In *Jackson*, the Court recognized the effect of the *Winship* standard on a federal court's review of state criminal convictions:

> [27] The standard of proof beyond a reasonable doubt . . . "plays a vital role in the American scheme of criminal procedure," because it operates to give "concrete substance" to the presumption of innocence, to ensure against unjust convictions, and to reduce the risk of factual error in a criminal proceeding. 397 U.S., at 363. At the same time, by impressing upon the factfinder the need to reach a subjective state of near certitude of the guilt of the accused, the standard symbolizes the significance that our society attaches to the criminal sanction and thus to liberty itself. *Id.*, at 372 (Harlan, J., concurring).
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> • • • •
>
> Yet a properly instructed jury may occasionally convict even when it can be said that no rational trier of fact could find guilty beyond a reasonable doubt, and the same may be said of a trial judge sitting as jury. In a federal trial, such an occurrence has traditionally been deemed to require reversal of the conviction. [Citations omitted.]

Id., at 315-317.

A federal court therefore "has a duty to assess the historic facts when it is called upon to apply a constitutional standard to a conviction obtained in state court." *Jackson, supra,* at 318.

The Magistrate quotes the last paragraph of the Court's analysis in *Jackson*:

> We hold that in a challenge to a state criminal conviction brought under 28 U.S.C. §2254—if the settled procedural prerequisites for such a claim have otherwise been satisfied—the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt.

443 U.S. at 324.

However, this brief holding needs to be interpreted in the context of the Court's earlier pin-pointing of the issue which the federal habeas corpus court must decide. Thus the Court stated:

> **[28]** But this inquiry does not require a court to "ask itself whether it believes that the evidence at the trial established guilty beyond a reasonable doubt." *Woodby v. INS,* 385 U.S., at 282 (emphasis added). Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson v. Louisiana,* 406 U.S. at 362. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime

charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review *all of the evidence* is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.[13]

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13. The question whether the evidence is constitutionally sufficient is of course wholly unrelated to the question of how rationally the verdict was actually reached. Just as the standard announced today does not permit a court to make its own subjective determination of guilty or innocence, it does not require scrutiny of the reasoning process actually used by the factfinder—if known. See generally 3 F. Wharton, Criminal Procedure §520 (12th ed. 1975 and Supp. 1978).

443 U.S. at 318-19. After the holding quoted by the Magistrate and after reviewing the *Jackson* facts, the majority significantly further delimited the power of the federal habeas corpus court in applying the new *Jackson* principle:

> Only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could this petitioner's challenge be sustained. That theory the Court has rejected in the past. *Holland v. United States*, 348 U.S. 121, 140. We decline to adopt it today. Under the standard **[29]** established in this opinion as necessary to preserve the due process protection recognized in *Winship*, a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume—even if it does not affirmatively appear in the record—that the trier of fact resolved any such conflicts in favor of the prosecution, and must defer to that resolution.

Id., at 326.

B.

The State's Case

This court need not review the testimony of each prosecution witness. But for purposes of analysis under *Jackson*, the testimony of several key witnesses will be assessed.

Davidson and Ogeltree both testified concerning Walker's planning of and participation in the A&P store robbery and homicide. In virtually all respects, their testimony corroborated one another as to the details of the crime—Walker enlisting the aid of Ogeltree who took Walker to Davidson, Davidson's theft of a white Plymouth automobile at Walker's request to be used in the robbery along with Walker's use of a brown Maverick, the aborted robbery attempt on July 21, 1972, the return to Canton on July 22, the robbery, homicide and getaway.

Davidson testified that Walker, Ogeltree and a man named Bennett, who also participated in the robbery, entered the A&P store armed with handguns. Ogeltree testified that he saw Walker shoot Guy Mack at one of the checkout counters. Three shots were [30] fired, two of which struck Mr. Mack, fatally wounding him.

In his analysis, the Magistrate frankly states that he is "assessing the credibility of the testimony of Messrs. Davidson and Ogeltree. . . ." Davidson and Ogeltree are "inherently unbelievable" because, in the Magistrate's view, Ogeltree may have harbored a personal grudge against Walker.[11] In addition, he noted that both Ogeltree

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11. Defense testimony suggested that Ogeltree was lying about Walker's participation and the robbery and homicide because Walker had been romantically involved with Ogeltree's former wife. While this was certainly a matter affecting Ogletree's credibility, the jury was entitled to reject the inference the defense wished to be drawn. The marital relationship between Ogeltree and his wife had apparently ended well before Walker became involved with her. Moreover, the end of the marital relationship had occurred several years before the robbery and homicide.

and Davidson stood to gain a recommendation of leniency to the Governor if they identified and testified against Mr. Mack's killer.

By frankly "assessing the credibility" of state's witnesses Ogeltree and Davidson, the Magistrate assumed a function that belonged alone to the state court trier of fact. In deferring to the presumption "that the trier of fact resolved any . . . conflicts in favor of the prosecution," as the federal habeas corpus court [31] must do, it is not for this court (nor the Magistrate) to assess the credibility of any of the state's witnesses.[12]

Clarence Cash, an operator of an "after hours" bar in Cleveland and acquaintance of Warren Davidson and Raymond Walker, testified that he had a conversation with Walker at the Pink Lady Bar in Cleveland sometime in late May or June of 1972. He stated that Walker asked him, "How was Bay-Bay on a job?" Bay-Bay is a nickname for Davidson and "job" is a street term for robbery. He further testified that he saw Walker at the bar on another occasion sometime before June 18, 1972.

James Curry, a "running mate" or friend of Davidson and Ogeltree, testified that he talked with Walker around mid-June of 1972 at a garage on 125th street. The testimony of Cash and Curry is important because it places Walker not in jail but free in Cleveland in June 1972.

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12. Apart from the *Jackson* limitation in the function of the federal habeas corpus court, it is always true that only the trier of fact is able to measure witness credibility. Pleading a cold transcript is no substitute for personally viewing the witness. The demeanor of witnesses in the presentation of live testimony is an invaluable tool which only the trier of fact can evaluate. Courts have repeatedly held that the credibility of witnesses is not a matter of review for a federal habeas corpus court. *Pigford v. United States*, 518 F.2d 831, 836 (4th Cir. 1975); *Edwards v. Sasser*, 462 F.Supp. 374, 376 (E.D. Va. 1979). *Jackson* has not altered that standard.

It directly conflicts with Walker's alibi defense that he was incarcerated during that period of time.

The Magistrate discredits the testimony of both Cash and Curry. The testimony of Mr. Curry is thus discounted:

> **[32]** Mr. Curry, who was picked up as a suspect by Officer Floyd as resembling one of the persons depicted in composites circulated by the Canton Police and by his own admission "a running mate" of Warren Davidson and Fred Ogeltree, fixed his conversation as having taken place during the week before Roosevelt Holden was killed. That would have placed it about June 11, 1972. The record establishes without any contradiction that on June 12, 1972, Raymond Walker appeared before [a] judge of the Common Pleas Court of Cuyahoga County. That being so, he could hardly have been on the street a day earlier.

(Mag. 104.) The first difficulty with this analysis is that the Clerk of Court's records did not show that Walker was in court on June 12, although the jail records indicate that he had a court appearance on that date. This discrepancy was for the jury, not this court (or the Magistrate), to resolve. Further, the Magistrate deduces that the conversation between Walker and Curry was "about June 11, 1972." He reaches this conclusion because Curry testified that the conversation was "during the week before Roosevelt Holden was killed (stipulated to have happened on June 18, 1972)." The Magistrate then concludes, "That being so, Walker could hardly have been on the street a day earlier," that is, one day before Walker's June 12 court appearance. Resolving any conflict in the evidence concerning the exact day of the conversation was a factual judgment for the jury to make. Viewing the evidence in the light most favorable to the prosecution, this court

(and the Magistrate) must presume that the jury concluded that a conversation [33] occurred and indeed that it happened within the time frame testified to by Curry.[13]

The prosecution produced a distinterested eyewitness, Rene Clark, who was within fifteen feet of the checkout counter where Mr. Mack was shot. She testified that she got a good look at the robber at the checkout counter. She positively identified Walker as the man who shot Mr. Mack. She did not change her in-court identification despite a rigorous cross-examination by Walker's counsel. He attacked her in-court identification by referring to a line-up in which she did not identify Walker and placed a question mark by the number of another stand-in. On redirect, she testified that she purposefully made a misidentification out of fear. This is the redirect interrogation:

> Q. Miss Clark, going to that particular lineup situation I'd like you to tell the jury fully what happened, how you came about circling number one and putting the question mark. Explain to them what you have explained to me previously.
>
> Mr. Tolliver: Objection to this.
>
> The Court: Overruled.
>
> [34] A. Well, they called me and I came down and I got a son. He's two months old now and I

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13. Similarly doubting the credibility of Cash's testimony, the Magistrate queries, "[W]hy Raymond Walker had to be led to the neighborhood car-thief (Warren Davidson) by Fred Ogeltree the morning of his planned crime when he had been inquiring about the same person [with Cash] almost two months earlier?" Again, however, this is a matter for the jury to settle. Viewing the evidence in the light most favorable to the prosecution, this court (and the Magistrate) must presume that the jury resolved any conflicts in the evidence in favor of the prosecution and concluded that the conversation occurred between Cash and Walker as Cash testified.

went in and I noticed the man when I went in there, but I got a cold chill, you know what I'm saying?

Q. Now, when you say you noticed the man when you walked in there what do you mean?

A. I recognized him on the robbery.

Q. Who?

A. The man in the plaid jacket.

Q. You're indicating the defendant?

A. Uh, huh.

Q. O.K.

A. And I went in there and I looked, you know, and the man told me he said circle the one that you think it is and if you're not sure put a question mark. I asked him again, and I couldn't talk to nobody else. So I had to—I wanted to make sure that I heard him right, and so I went in there and I circled it. And then Detective Newkirk—

Q: Let me just stop you there fore (*sic*) one second. When you walked in and you looked at the lineup were you sure right then.

Mr. Tolliver: Objection.

The Court: Overruled.

A. When I walked in I knew who it was and I was sure but I was scared to, you know—I didn't—

Q. Go ahead. Then you said you walked out.

A. I walked out and I went into this little room and they have where you sign this paper that he showed me and I put a circle and put a question mark by it and Detective Newkirk came out and I said Newkirk, you know—

Mr. Tolliver: Objection to this conversation.

A. I knew—

The Court: Not what someone told you, Miss Clark. she added that Walker "positively looks like him."

A. I told Detective Newkirk that I knew—that I recognized him when I walked in there and I got scared and I circled number one with a question mark.

[35] Q. When you said that did you say a particular number to Detective Newkirk?

A. Number five.

Q. Did you say I knew it was number five?

A. I said I recognize—

Mr. Tolliver: Objection.

The Court: Overruled. You may answer.

A. I said I recognized number five and I circled number one and put the question mark by it. Because I just got—I just got stiff. I don't know. Something just came over me. I got scared when I went in there.

The Magistrate dismisses Ms. Clark's explanation because

> [i]t is inconceivable that an experienced police officer who had dedicated three years to solving the murder of a fellow officer would permit the only eyewitness who could identify his prime suspect to walk away from the lineup with a threat to "kick your butt all the way back to Detroit" [testified to by a public defender who attended the line-up on behalf of Walker] ringing in her ears, rather than making some effort to have her correct the identification.

(Mag. 103-04.) The question is simply not whether the Magistrate or this court believes the testimony. Such speculation about Rene Clark's testimony is plainly at odds with the requirement that the evidence be viewed in the light most favorable to the prosecution, resolving all conflicts in its favor and deferring to that resolution.

Other corroborating witnesses testified for the prosecution. Mr. Mack's wife, Mabel Mack, although unable to positively identify Walker as her husband's killer, testified that Walker "looks very much like the man" who shot her husband. On cross-examination she added that Walker "positively looks like him." [36] She was then asked, "Are you saying that the features [of Walker] are similar to the person you saw?" She answered, "Yes."

Mrs. Willie Mae Hart, who resided near the A&P store, testified that shortly after the shooting she saw a brown compact automobile leave the scene of the crime, driven by a black male with a bad complexion similar to Walker's. Although she could not positively identify Walker, she testified that they both had the same characteristic, a bad complexion. Her testimony also supported Ogeltree's and Davidson's statement that Walker escaped from the A&P store parking lot alone, driving the brown Maverick, while the three other participants left in the white Plymouth driven by Davidson.

The testimony of the state's principal fact witnesses has now been reviewed. Rather than dismiss the probative value of the testimony of these witnesses as the Magistrate did, the court must credit each of these witnesses insofar as the testimony bears on the ultimate issue to be decided by this court: whether *any* rational trier of fact could find Walker guilty beyond a reasonable

doubt (as emphasized in *Jackson, supra,* at 319). What the Magistrate has done, *Jackson* says he should not do:

> But this inquiry does not require a court "to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt."

443 U.S. at 319.

[37] C.

Walker's Alibi

The prosecution, well aware of Walker's alibi defense, acknowledged from the outset that Cuyahoga County jail records, on their face, recorded Walker as having been incarcerated between April 14 and August 1, 1972. Like any other alibi, however, Walker's alibi was subject to attack.

Prisoners upon entering the jail were recorded in the jail register at the booking desk which kept the jail's total inmate population. Cards with each inmate's photograph and personal data were filled out. One card remained at the booking desk while the other was kept on the floor where the prisoner was assigned.

Ricardo Brown, the acting Cuyahoga County jail warden between April and August 1972, testified in the prosecution's case-in-chief. He stated that deputies on each floor were responsible for "keeping count of the prisoners." On each floor, the deputies kept "daily report sheets" consisting of tallies of card counts and physical or "head" counts of the prisoners. He testified that the prisoners on each floor were "theoretically" to be counted on each of three daily shifts. But "as a matter of practice," a physical or "head" count of prisoners was conducted only on the third shift (11 p.m. to 7 a.m.). The other shifts simply did not physically count the prisoners.

Ricardo Brown also testified regarding specific discrepancies in the daily report sheets for several floors on various [38] days, including July 21 and 22, 1972. For instance, the daily report sheet for the fifth floor (Walker's), second shift (3 p.m.-11 p.m.), on July 21, 1972, showed a "head" count of 175 and a card count of 162. The daily report sheet for the same floor, first shift (7 a.m. to 3 p.m.) on July 22, 1972 (the day of the murder), showed a "head" count of 174 and a card count of 175.[14] Comparisons for the other floors showed similar discrepancies.

Several sheriff's deputies assigned to jail duties also testified about prisoner counts. One of these, Security Sergeant Urankar, agreed that "every night . . . the body count from the floor had to match the body count down at the booking desk." He further answered "no, sir" to the question, "From what you were shown by the prosecutor, was there any discrepancy in any of the records that were shown to you by the prosecutor as to the body count?"

The Magistrate thus summed up the jail prisoner count testimony:

> While the prosecution was able to demonstrate some discrepancies in the testimony of the sheriff's deputies who appeared as defense witnesses regarding the particulars as to how certain procedures were carried out at the Cuyahoga County Jail, there was no evidence that at anytime during the critical time period the total head count of prisoners on the several floors differed from the count of the jail population as maintained at the booking desk.

(Mag. 102.)

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14. Brown also testified that "more often than not" when the head count did not match the card count, the deputies simply changed one or the other so that they would match. (Tr. 89.)

[39] Since none of the prisoner counts were stipulated, it was for the jury to decide from the jail records in evidence as well as the oral testimony of jail security personnel what weight, if any, should be given to the various counts. Thus the jail records did not provide "conclusive" proof that Walker was in jail on July 22 as Walker argues in the margin.[15] It is correct, as the Magistrate concludes, that "there was no evidence that . . . the total head count of prisoners on the second floor differed from the count of the jail population as maintained at the booking desk." But jail officials also testified that the "head" and card counts on each floor were supposed to match. (*See* Tr. 369-70, 401-02, 638, 700-01, 723-24.) The fact that "more often than not" those counts failed to match certainly bears on the general reliability of the jail records and the efficiency of jail personnel.[16]

Other testimony questions the accuracy and reliability of the jail records. Thomas Baker, the assistant chief **[40]** of records at the jail, testified that jail records indicated that Walker left the jail for court appearances on April 14, 20, and 26, May 18 and 19, June 12 and 13, and August 1, 1972. Yet the appearance docket of the Cuyahoga County Clerk of Courts showed that Walker

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15. "[T]he record is conclusive that Walker was in the Cuyahoga County jail on the day Guy Mack was killed, July 22, 1972. . . The jail records revealed that the third shift body count corresponded with the booking desk records indicating that the full complement of prisoners was present (T. 78-80, 369, 370, 691, 703, 704, 731, 781, 782, 892). [The balance of this argument falls because it depends on the assumption just argued that the jail records are "conclusive." As seen, this assumption is not established.] To get into the jail, one must pass the booking desk, two locked gates and a locked door, each of which must be manually unlocked and take one of two manually operated elevators to the upper floors of the jail. (T. 696-699). To get out the reverse procedure must be followed."

16. Indeed, several of the daily report sheets showed that during various shifts, no card counts were even taken; or, if taken, were not recorded. (See Tr. 668.)

appeared in court only on April 14 and 26 and August 1, 1972. They do not show appearances on April 20, May 18 and 19, and June 12 and 13, 1972. (*See* Tr. 883-85.) Reasons were presented to the trier of fact for disbelieving the accuracy and reliability of the jail records. Thus the records cannot be regarded as "conclusive" proof.

Indeed, the Magistrate ignores the jury's right to accept all, or part or none of the jail records testimony. Moreover, the jury was entitled to draw whatever inferences, within its discretion, the evidence warranted. Thus, for example, the jury might have given significance to the fact that the head count was taken only once and then on the third shift (11 p.m.-7 a.m.). Hence, even the comparison of the total head count (of all floors) with the booking desk count (jail slate or alternatively, the jail register) at best gave only a once a day count of the total jail population. Thus it offered no proof as to the presence or absence of a prisoner from the jail during the balance of each 24-hour day.

Although seven Cuyahoga County jail officials testified about the records and record keeping procedures, no jail official testified on personal knowledge that **[41]** Walker was incarcerated between April and August 1972 or, more particularly, on July 21 and July 22, 1972. Three inmates of the jail testified that Walker was incarcerated and to their knowledge did not escape at any time. Nevertheless it was for the jury, hearing those witnesses, to determine their credibility and to doubt the reliability of their testimony if it so chose.

Other witnesses testified on Walker's behalf for the purpose of impeaching the credibility of Davidson, Ogeltree and Rene Clark. Here, too, credibility was a matter for the jury to determine first hand, and under *Jackson*, giving weight to their testimony is not within the authority of this court (or the Magistrate).

The conflicting evidence undoubtedly presented the jury a difficult question of fact. Yet, alibi defenses invariably present such conflicts. For instance, in *Harris v. Clusen*, 487 F.Supp. 616 (E.D. Wisc. 1980), the habeas corpus petitioner had been convicted in state court of armed robbery. The prosecution presented four witnesses to the robbery in Milwaukee, Wisconsin who identified the petitioner as the robber. The petitioner presented the alibi testimony of several family members that he had been at a family gathering in Chicago, Illinois on the day of the robbery. Petitioner challenged the sufficiency of the evidence under *Jackson*. Denying relief, the court stated:

> Viewing the evidence in this case in the light most favorable to the prosecution, four persons identified the petitioner as the person who committed **[42]** the armed robbery, and one testified that she saw a gun in petitioner's possession during the commission of the robbery. Given the directly contrary testimony of petitioner's witnesses that he was in Chicago at the time, the jury as the trier of facts was required to choose between believing the prosecution's or the petitioner's witnesses, and it was entitled to make that choice in the manner which it did.

Id., at 617-18. Although Walker's alibi evidence is unique and differs from the nature of the alibi evidence presented in *Harris*, the point remains that under *Jackson* conflicts in the evidence are to be resolved by the federal habeas corpus court in favor of the prosecution. The trier of fact in this case, as in *Harris*, was "entitled to make that choice in the manner which it did." On the competent and relevant evidence of record, this court cannot say the jury acted irrationally.

III.

Conclusion

For the reasons stated in Part I of this memorandum, Walker's third ground for relief is granted. For the reasons stated in Part II of this memorandum, the first and second grounds for relief are denied. Unless the state chooses to retry Walker within 120 days from the filing of the memorandum and order of this court, Raymond Walker shall be released.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
U.S. District Judge

SUPPLEMENTAL MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT

(Filed February 2, 1981)

C79-2132

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

RAYMOND WALKER,
Petitioner,

vs.

ARNOLD R. JAGO, SUPT.,
Respondent.

SUPPLEMENTAL MEMORANDUM AND ORDER
THOMAS, *J.*

I.

On January 28, 1981, this court issued a memorandum and order granting the third ground for relief in Raymond Walker's petition for a writ of habeas corpus. At p.19 of the memorandum, this court stated, "The prosecutor's questioning of [Willie] Hightower permitted the jury to infer that one of defendant's witnesses may have offered a job to [John] Appling to persuade him not to testify." As clearly indicated by the quotations of testimony preceding the above statement in the memorandum, this court's reference at p.19 should have been to the prosecutor's questioning of "Stretch" Myers, another defense witness, and not to Willie Hightower.

II.

One week before this court issued its memorandum and order, the Supreme Court decided the case of [2] *Sumners v. Mata*, 49 U.S.L.W. 4133 (1981), which dealt with the presumption of correctness under 28 U.S.C. §2254(d) to be applied in federal habeas corpus proceedings where a state court has made "a determination after a hearing on the merits of a factual issue. . . ." *Sua sponte* this court shall consider the effect of section 2254(d),[1] as elucidated in *Sumner*, on the ruling in Part I of the January 28 memorandum and order.

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1. Subsections (1)-(7) of section 2254(d) have no application in this case. Section 2254(d)(8) provides:

> (d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
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> • • • • •
>
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

[3] In *Sumner*, on the basis of 28 U.S.C. §2254(d), the Supreme Court vacated and remanded a Ninth Circuit decision granting a writ of habeas corpus. The court of appeals had held that a pretrial photographic identification procedure used by state police was impermissibly suggestive and gave rise to a substantial likelihood of misidentification of the petitioner in violation of the due process clause of the Fourteenth Amendment. The Ninth Circuit's findings were "in conflict with the conclusion reached by every other state and federal judge after reviewing the exact same record."[2] 49 U.S.L.W. at 4136.

Writing for the Court's majority, Justice Rehnquist observed:

> [I]t is apparent that the Court of Appeals for the Ninth Circuit did not apply the "presumption of correctness" which is mandated by [28 U.S.C. §2254(d)] to the factual determinations made by the California state courts. Indeed, the court did not even refer in its opinion to §2254(d).
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> • • • • •

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2. The habeas corpus petitioner in *Sumner* had been convicted of first degree murder of a fellow inmate at a state correctional facility. On appeal, the California court of appeals held that the photographic identification procedure was fair, finding that "there [was] no showing of influence by the investigating officers; that the [state identification] witness had an adequate opportunity to view the crime; and that their descriptions [were] accurate." *Sumner*, 49 U.S.L.W. at 4134 (quoting the California decision). A state habeas corpus action by petitioner was unsuccessful.

A federal district court denied the petitioner a writ of habeas corpus. The Ninth Circuit reversed and granted the writ. It found (1) that the circumstances surrounding the witnesses' observation of the crime gave rise to a likelihood of misidentification; (2) the witnesses had not given sufficiently detailed descriptions of the assailant; and (3) considerable pressure from prison officials and prison factions had been exerted upon the witnesses. 611 F.2d at 758-759.

> **[4]** When Congress provided in §2254(d) that a habeas corpus court could *not* dispense with the "presumption of correctness" embodied therein unless it concluded that the factual determinations were not supported by the record, it contemplated at least some reasoned written references to section 2254(d) and the state court findings.

Id.

The Court recognized that federal habeas corpus proceedings have created a source of friction between the state and federal judicial systems. The Court concluded that "Congress obviously meant to alleviate some of that friction when it enacted subsection (d)" to section 2254 in 1966. "This interest in federalism requires deference by federal courts [under section 2254(d)] to factual determinations of all state courts." *Id.* at 4135. Accordingly, the Court held that

> a habeas court should include in its opinion granting the writ the reasoning which led it to conclude that any of the first seven factors [of section 2254(d)] were present, or the reasoning which led it to conclude [under subsection (8)] that the state finding was "not fairly supported by the record."

Id. at 4137.

This court is aware that the Ohio Supreme Court, on Walker's direct appeal, considered what it termed "contested testimony" and rejected Walker's allegations of error. Without detailing the substance of the "contested testimony,"[3] the Ohio Supreme Court adopted the Ohio **[5]** court of appeal's reasoning that Walker

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3. Petitioner's brief before the Ohio Supreme Court discussed each of the evidentiary errors upon which this court relied in Part I. The only specific discussion of the "contested testi-

(Continued on following page)

> having offered the records as proof of the truth therein stated, as well as proof of the facts reasonably to be inferred therefrom . . . placed in issue the credibility generally of the records, the recordmaking process and the record keepers.

55 Ohio St. 2d at 214. The Court stated:

> Upon a review of the contested testimony, we find that it was relevant, in that it tended to disprove the accuracy of the jail records, which was a question in dispute in the instant cause. The contested evidence went to the credibility of the various jail records by demonstrating the overall inefficiency of the persons and the system in which they were maintained and the general lack of inmate supervision.

Id. In addition, the Court found that the admission of the "contested testimony" was "neither an abuse of discretion nor a resultant prejudicial harm to [Walker]." *Id.*

In Part I, subsections A-F of this court's memorandum and order, six separate evidentiary "episodes" at petitioner's trial were reviewed and analyzed. In each subsection it was concluded, contrary to the Ohio Supreme Court, that the factual information, permitted by the trial court to be presented to the jury, was either completely irrelevant to the issues raised by Walker's alibi defense or grossly prejudicial to a fair consideration of that defense by the jury (or both). It was concluded that the eviden-

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Footnote continued—

mony" by the Ohio Supreme Court concerned evidence of gambling at the Cuyahoga County Jail. 55 Ohio St.2d at 214, n.2. The relevance (or lack thereof) of that testimony was not one of the six main evidentiary errors in subsections A-F of Part I upon which this court relied in finding a constitutional violation.

tiary errors when considered together amounted to a due process violation.

This court's determination in Part I is "considerably at odds" with the conclusion of the Ohio Supreme [6] Court. *See Sumner, supra,* at 4134. The conflicting determinations, however, are not, strictly speaking, findings of fact within the meaning of section 2254(d). They are legal conclusions about the relevancy and prejudice of evidence presented at Walker's trial. At most they are mixed questions of law and fact. Nevertheless, to the extent that the Ohio Supreme Court's decision may implicitly embody any findings of fact, this court concludes, for the reasons set forth in Part I, subsections A-F of the memorandum and order, that such findings of fact are not "fairly supported by the record" and are therefore not entitled to the "presumption of correctness" set forth in section 2254(d).

III.

Petitioner moves this court, pursuant to Fed.R.App.P. 23(c) to order his release from custody upon a personal recognizance bond or other appropriate bond, pending the respondent's appeal from this court's decision. Respondent opposes petitioner's motion but requests that, if granted, bond be set at an amount and with sufficient sureties to secure his appearance for retrial. In addition, respondent requests this court to stay its order requiring a retrial within 120 days from January 28, 1981. A hearing on petitioner's motion [7] to set bond and respondent's request for a stay is hereby scheduled for April 3, 1981 at 3:00 p.m. An appropriate order shall be issued to secure petitioner's presence at the hearing.

IT IS SO ORDERED.

/s/ WILLIAM K. THOMAS
U.S. District Judge

OPINION OF THE SUPREME COURT OF OHIO

(Decided July 26, 1978)

No. 77-984

THE SUPREME COURT OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO,
Appellee,

vs.

RAYMOND WALKER,
Appellant.

Appeal from the Court of Appeals for Stark County
[55 Ohio St. 2d 208]

Raymond Walker, A. K. A. Dewitt Ingram (appellant), was indicted on March 12, 1976, by the Stark County grand jury for the crime of first degree murder, R. C. 2901.01. The indictment, in relevant part, reads:

"That Raymond Walker • • • on or about the 22nd day of July in the year of our Lord one thousand nine hundred and seventy two • • • did purposely, in perpetrating or attempting to perpetrate robbery, kill Guy Mack • • •."

Guy Mack (decedent), an off-duty city of Canton police officer, was shopping with his wife for their weekly groceries in an A & P store located at 1800 East Tuscarawas, Canton, Ohio, on the morning of July 22, 1972. While their purchase was being tabulated, three men entered the store. One remained by the door, another entered the manager's

cage and the third proceeded to the checkout counters. The decedent then attempted to grab this third man, as he was collecting the money from the checkout counter. This third man fired three shots, two of which struck the decedent fatally wounding him.

Subsequently, Warren Davidson and Fred Ogeltree were arrested in connection with their participation in this crime. Both were convicted, in 1973, of first degree murder and sentenced to life imprisonment. While serving their sentences at Lucasville, Davidson and Ogeltree implicated the appellant as the person actually responsible for fatally shooting the decedent.

The second trial of the appellant for the murder of the decedent was commenced on August 23, 1976 (the first trial resulted in a hung jury). Both Davidson and Ogeltree testified at trial as to appellant's participation in the robbery. Ogeltree stated that he saw the appellant shoot the decedent. It was admitted during the trial that the Stark County prosecutor had agreed to send a recommendation to the Governor of Ohio, noting the cooperation of Davidson and Ogeltree in return for their testimony in the instant cause.

The state of Ohio (appellee) also introduced an eyewitness, Rene Clark, who at the trial positively identified the appellant as the man who shot the decedent. Other evidence was adduced by appellee to support its case. This evidence included, *inter alia*: (1) The decedent's wife, although unable to positively identify the appellant as the murderer, stated that he definitely looks very much like the man, and (2) Mrs. Willie Mae Hart testified that shortly after the crime occurred she saw a brown compact automobile being driven by a man with a bad complexion similar to appellant's. This testimony of Mrs. Hart to

some extent supported Ogeltree's and Davidson's testimony concerning the details of their and appellant's departure from the scene of the crime.[1]

The appellant introduced the defense of alibi. Appellant submitted in evidence the records of the Cuyahoga County jail, which show that appellant was therein incarcerated from April 14, 1972, until his release on August 1, 1972. Appellant further introduced other evidence in an attempt to discredit the testimony of Davidson and Ogeltree and that of Rene Clark.

In order to discredit appellant's alibi, appellee adduced various testimony, attempting to disprove the credibility of the records of the Cuyahoga County jail, including, but not limited to, the testimony of three people to the effect that they had seen appellant not in police custody but free in Cleveland in June of 1972.

On September 3, 1976, the jury returned a verdict of guilty. The trial judge thereupon sentenced the appellant to a term of life imprisonment.

Appellant then appealed to the Court of Appeals, which affirmed the judgment of the trial court.

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1. Ogeltree testified that, after the robbery and the shooting, he departed in the stolen Plymouth (white automobile) along with Davidson and Bennett and that Robinson drove away in the brown automobile. He further stated that they returned to where they had left Bennett's Oldsmobile and then transferred from the Plymouth to the Oldsmobile.

Davidson testified that he drove the stolen Plymouth as they left the A & P supermarket with Bennett and Ogeltree in it and that appellant was ahead in the brown Maverick automobile.

Mrs. Hart stated, at trial, that she noticed a brown and a white car traverse her street twice on the morning of the incident. Additionally, she testified that on their return trip, about 20 minutes after she first saw them travel Monroe in the opposite direction, the white car was occupied by two males and it followed a brown automobile driven by one male with a rough complexion, similar to appellant's.

The cause is now before this court pursuant to the allowance of a motion for leave to appeal.

Per Curiam.

I.

Appellant, in his first proposition of law, essentially asserts that the evidence presented at trial did not attain the requisite degree of proof needed to support his conviction. Our consideration of this proposition is limited to an examination of the record at the trial to determine whether the evidence presented, "which, if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *Atkins v. State* (1926), 115 Ohio St. 542, 546. This review is thus confined to a determination of whether there was substantial evidence. *State v. Sheppard* (1956), 165 Ohio St. 293, paragraph five of the syllabus; *State v. Stewart* (1964), 176 Ohio St. 156, 160.

A review of the record reveals that appellee produced the testimony of two accomplices, Davidson and Ogletree, as to appellant's participation in the crime. Ogeltree testified that he saw appellant shoot the decedent. The record also contains the in-trial identification of appellant as the decedent's murderer by Rene Clark, an uninterested eyewitness. Her in-court identification of appellant withstood a vigorous cross-examination by appellant's counsel. Furthermore, the decedent's wife, Mrs. Mack, testified that the appellant looked "very much like the man" who shot her husband. The testimony of Mrs. Hart, introduced by the appellee, corroborated the testimony of Davidson and Ogeltree with respect to their and appellant's fleeing the scene of the crime. Mrs. Hart, who lives in the proximity of the A & P food store, testified that on the morning of July 22, 1972, she observed two cars traverse the street where she lives at a very high rate of speed. Mrs. Hart

stated that the first car was white and occupied by two males, and the second was a brown compact and was driven by a man with a rough complexion similar to the appellant's. Appellee also produced, in addition to the testimony of Davidson and Ogeltree, three other witnesses, who stated at trial that they had seen the appellant in Cleveland and free of custody during the period the records of the Cuyahoga County jail reflect his confinement therein.

Appellant, in his first proposition of law, does not argue the inadmissibility of any of the preceding evidence Instead, appellant at first reiterates the evidence that was produced during the trial with respect to his alibi of incarceration in the Cuyahoga County jail on the date of the murder, *i. e.*: (1) The court and jail records show he was in jail on that date; (2) inmates testified that he was in jail continuously during the period of confinement; and (3) no evidence of appellant's escape from or surreptitious re-entering into the jail was produced at the trial. Appellant then proceeds to recount the evidence presented against him. He argues with respect to the testimony of Davidson and Ogeltree that they testified with the hope of leniency, referring to the Stark County prosecutor's promise to send a recommendation to the Governor. Appellant also states that Ogeltree bore malice toward him because of appellant's involvement with Ogeltree's former wife. Furthermore, appellant argues that it was revealed at trial that Ogeltree had told three people that appellant was not involved in the robbery and murder. Concerning the testimony of Rene Clark, appellant cites her earlier identification of a person other than appellant as the decedent's murderer. Moreover, appellant states that there was testimony that, after Rene Clark failed to identify appellant in a lineup, she was verbally abused by Sergeant William Newkirk of the Canton Police Department. Ap-

pellant thus implies intimidation with respect to her in-trial identification of appellant, but the record reveals that she denied this and stated that her earlier misidentification was the intentional product of her fear. Appellant continues to proceed with his refutation of appellee's evidence. This court, however, discerns little utility in complete reiteration of appellant's argument.

It is readily apparent that appellant, in his first proposition, is not asserting the insufficiency of the evidence presented at trial, but is engaging in an attack on the credibility of the evidence. Clearly, the evidence produced by the appellee, "if believed, would convince the average mind of the defendant's guilt beyond a reasonable doubt." *Atkins, supra,* at page 546. Credibility is a question of fact to be determined by the jury and a reviewing court should not substitute its judgment for that of the jury. *State v. Kehn* (1977), 50 Ohio St. 2d 11; *State v. Wolery* (1976), 46 Ohio St. 2d 316. This court's recent statement in *Feliciano v. Kreiger* (1977), 50 Ohio St. 2d 69, 72, is controlling in this cause:

"Since reasonable minds could reach different conclusions concerning this testimony, determination as to what occurred was a question of fact for the jury. * * * *State v. Antill* (1964), 176 Ohio St. 61. This court on review will not disturb this jury finding so long as there was competent evidence to support it. * * *"

Determining, therefore, upon our review of the record that there was substantial evidence presented which, if believed, would convince the average mind of defendant's guilt beyond a reasonable doubt, we find no merit to appellant's first proposition of law.

II.

Appellant, in his second proposition of law, alleges that for the reasons stated in his first proposition the verdict in the instant cause was clearly against the weight of the evidence and that the Court of Appeals failed to weigh the evidence.

We find no merit to appellant's second proposition of law. It is the function of the jury to resolve the facts of the case and determine the credibility of the witnesses before it. *State v. Clay* (1972), 34 Ohio St. 2d 250. Thus, it is the accepted rule in Ohio that, where there is a conflict of evidence, the jury is to resolve the conflict, and its judgment will be affirmed if there is substantial evidence which, if accredited, would prove all elements of the crime. *State v. Clay* (1972), 29 Ohio App. 2d 206, affirmed *State v. Clay, supra* (34 Ohio St. 2d 250). In the instant cause, the Court of Appeals stated, in its opinion:

"Upon a careful consideration of the entire evidence, we find ample competent evidence, which if believed by the triers of fact, warrants a finding of guilty beyond a reasonable doubt of the crime as charged. * * *"

The second assignment of error is, accordingly, overruled.

III.

Appellant's third proposition of law provides: "Evidence should be excluded where it does not logically tend to prove or disprove an issue in the case or where its relevancy is outweighed by its tendency to confuse or mislead the jury." The evidence complained of by appellant in this proposition concerns his alibi of incarceration in the Cuyahoga County jail on the day of the murder and appellee's attempt to refute the record-keeping system of

the Cuyahoga County jail. We find the Court of Appeals' resolution of this proposition below to be well reasoned. Specifically, appellant presented various records of the Cuyahoga County jail which showed that he should have been in the jail at the time decedent was killed. The Court of Appeals found that having offered the records as proof of the truth therein stated, as well as proof of the facts reasonably to be inferred therefrom, appellant placed in issue the credibility generally of the records, the recording making process and the record keepers.

Upon a review of the contested testimony, we find that it was relevant, in that it tended to disprove the accuracy of the jail records, which was a question in dispute in the instant cause. The contested evidence went to the credibility of the various jail records by demonstrating the overall inefficiency of the persons and the system in which they were maintained and the general lack of inmate supervision.

Moreover, upon an examination of the record, we find that the admission of certain of this testimony occurred without an objection[2] and that a great proportion of this testimony occurred during cross-examination. The trial judge is posited with broad discretion in controlling cross-examination, and the appellant has the burden to show a patent abuse of discretion. *Sabo v. State* (1928), 119 Ohio St. 231; *State v. McElroy* (1970), 22 Ohio App. 2d 103, 111. We find, in the instant cause, that the admission of

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2. The record reveals that, on the cross-examination of Frank Urankar, numerous questions concerning gambling in the Cuyahoga County jail were asked and answered before appellant's counsel objected to the specific question as to the extent of the gambling.

Lieutenant Steven Popovich also answered questions concerning gambling in the jail on cross-examination, and the record reveals no objection to these questions being raised by appellant's counsel.

this testimony was relevant to the credibility of the jail records which support appellant's alibi and was neither an abuse of discretion nor a resultant prejudicial harm to appellant.

Appellant's third proposition of law is overruled.

IV.

Appellant, in his fourth proposition of law, argues that the trial court erred in permitting Ogeltree and Davidson to testify that they had received a threatening note and that the jail trusty who delivered the note stated that it was from the appellant. Appellant also contends that the trial court erroneously admitted the testimony of one James Curry, that he was told two weeks before the trial by three men not to testify and that they reminded him that he had a brother and sister.

Appellant relies on *Mefford v. State* (1920), 13 Ohio App. 106, wherein the court stated, at page 107:

"Attempts by persons other than the accused to bribe witnesses, or otherwise to suppress or manufacture evidence, are evidence against the accused when, but only when, it is proven that he was connected with such attempts. Acts and statements of third persons, not known or authorized by him, are inadmissible."

However, in *Mefford, supra*, the court was confronted not with the actions of the accused, but that of his attorney. In the instant cause, Ogeltree testified, without objection, that he received a threatening note which was signed by the appellant. Davidson testified that when he received the note its deliverer, a jail trusty, stated that it was from the appellant.

Furthermore, the Court of Appeals found that this evidence was made proper because of the opening state-

ment of appellant's counsel, which inferred that the testimony of the state's claimed accomplice witnesses was a recent fabrication prompted by a strong motive to swear falsely. The Court of Appeals, therefore, held that this evidence was relevant to show the circumstances under which the state's witnesses had been placed by their election to testify and specifically for the purpose of showing that they had something to lose as well as to gain by testifying.

Assuming, *arguendo*, that the admission of this testimony was erroneous, upon a review of the entire record, disregarding the objectionable testimony by Davidson and Ogeltree, this court finds the error constitutionally harmless. *Harrington v. California* (1969), 395 U. S. 250; *Chapman v. California* (1967), 386 U. S. 18; *Schneble v. Florida* (1972), 405 U. S. 427. In *Schneble, supra*, the United States Supreme Court stated:

"* * * In *Bruton*, the Court pointed out that '[a] defendant is entitled to a fair trial, but not a perfect one.' 391 U. S., at 135, quoting *Lutwak v. United States*, 344 U. S. 604, 619 (1953), Thus, unless there is a reasonable possibility that the improperly admitted evidence contributed to the conviction, reversal is not required. See, *Chapman v. Calif.*, 386 U. S. 18, 24 (1967). In this case, we conclude that the 'minds of an average jury' would not have found the State's case significantly less persuasive had the testimony * * * been excluded. The admission into evidence of these statements, therefore, was at most harmless error."

In the instant cause, since there was the testimony of at least three persons[3] as to the appellant's participation

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3. Ogeltree, Davidson and Rene Clark all testified that appellant actually participated in the robbery and murder of the decedent.

in the robbery and murder, we find that these statements of threat about testifying, as relating to the appellant's guilt, were merely cumulative of other evidence before the jury.

The testimony of Curry, concerning the threat he received about his testifying, in no manner implied that the appellant was responsible for the threat. Further, appellant has failed to demonstrate any resultant prejudice from its alleged improper admission.

Accordingly, appellant's fourth proposition of law is rejected.

V.

In his fifth proposition of law, appellant states:

"A court order directing that a defendant be incarcerated pending a trial cannot be collaterally attacked by evidence that the defendant was not incarcerated during this period."

Appellant, in this proposition, raises an allegation of error not presented in the court below. In *State v. Williams* (1977), 51 Ohio St. 2d 112, this court reaffirmed, in paragraph two of the syllabus, its adherence to the well-established law that:

"The Supreme Court will not ordinarily consider a claim of error that was not raised in any way in the Court of Appeals and was not considered or decided by that court. (*Toledo v. Reasonover*, 5 Ohio St. 2d 22, approved and followed.)"

Appellant's proposition of law No. 5 is rejected.

VI.

In his final proposition of law, appellant asserts that he was denied the due process of the law because the atmosphere in and around the courtroom was so hostile as to interfere with the trial process. Appellant is arguing, in this proposition of law, that he has a right to be "fairly tried in a public tribunal free of prejudice, passion, excitement and tyrannical power"[4] (309 U. S. 227, 236-237) and that, in the instant cause, this right was denied him by the conduct of the judge and prosecutor.

This proposition of law raises, *inter alia*, the issue presented to the Court of Appeals concerning the admissibility of the testimony of one John Appling and the inquiry of other witnesses as to their knowledge of Appling. It is apparent from the record that appellant at no time objected to any of the proceedings concerning the testimony of Appling. Accordingly, the appellant is precluded by Crim. R. 30 from using this issue on appeal. *State v. Williams, supra* (51 Ohio St. 2d 112). We concur with the Court of Appeals' resolution of appellant's contention concerning the questions asked to certain of the defense witnesses about their knowledge of Appling, who was supposedly in jail on the date of the murder. The questions were appropriate under the totality of the circumstances to test the recollection and credibility of the witnesses and the records they purport to support insofar as their accuracy was concerned and whether they, in fact, reflected the presence of persons supposedly confined in the Cuyahoga County jail.

The remaining issues—the misconduct of the prosecutor and the trial judge—presented in this proposition were not raised in the Court of Appeals and need not be

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4. *Chambers v. Florida* (1940), 309 U. S. 227, 236-237.

considered herein. *Toledo v. Reasonover, supra; State v. Williams, supra.*

Apart from the failure to present these issues in the Court of Appeals, we find that appellant's assertions of errors relating to the misconduct of the prosecutor and trial judge are totally lacking in substance. The assertion that the judge's conduct was not as a disinterested mediator is premised in part upon the following comment made by the judge during the testimony of James Miller, a deputy clerk of courts of the Court of Common Pleas of Cuyahoga County concerning the records pertaining to Walker:

> "Q. Can you tell me how many other mistakes you have made?
>
> "Mr. Tolliver: Objection to this, judge.
>
> "The Court: Yes, sustained.
>
> "Q. Nothing further.
>
> "A. I am not a handwriting expert.
>
> "The Court: That answer will be stricken from the record. This witness will be admonished from making a statement without a question before him, sir, You are not in Cuyahoga County today, and the jury will disregard it.
>
> "Mr. Tolliver: Oh, judge.
>
> "The Court: I withdraw that and the jury will disregard my remarks, too."

As the record reflects, the trial judge immediately rectified his statement and admonished the jury to disregard it. This court has examined the other alleged errors, which mainly relate to the trial judge's discretion in control of cross-examination during trial, and, finding them to be without merit, this court will not address them herein.

Appellant's sixth proposition of law is rejected.

Accordingly, the judgment of the Court of Appeals is affirmed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, P. BROWN, SWEENEY and LOCHER, JJ., concur.

CELEBREZZE and W. BROWN, JJ., dissent.

CELEBREZZE, J., dissenting. Upon review of the record compiled at the trial of this cause I am of the opinion that reasonable minds must conclude that appellant's guilt was not established beyond a reasonable doubt. I am therefore constrained to dissent from the majority's decision to affirm appellant's conviction and sentence of life imprisonment.

At the outset of the opinion the majority states that its review will be confined to a determination of whether there was substantial evidence present at trial which would establish appellant's participation in the robbery-homicide. The majority then recounts the damning testimony presented by two incarcerated felons who were convicted as accomplices to this homicide, and who, more than three years after the homicide, first came forward with information as to appellant's alleged involvement in this crime, to be offered in exchange for a recommendation of leniency. The majority further observes that this inherently suspect and untrustworthy testimony is buttressed by the testimony of a young woman who was originally unable to identify appellant in a police line-up, but who, after some degree of encouragement by police officials, was later able to positively identify appellant in the courtroom. It is conceded by the majority that these three individuals were the only witnesses to testify that appellant actually

participated in the robbery and murder of the decedent. Nevertheless, the majority concludes that the state presented substantial evidence.

As his defense, appellant presented evidence tending to establish an alibi. The deputy clerk of courts for Cuyahoga County appeared as a witness for the defense, and testified that his records showed that appellant was unable to post bond on an unrelated charge, and therefore was incarcerated in the Cuyahoga County jail during the period from April 14, 1972, until the charge was dismissed on August 1, 1972. The prosecution, in fact, stipulated that the certified copy of the docket entry in the custody of the deputy clerk indicated that appellant was continuously confined for this three and one-half month period. Three fellow inmates of the Cuyahoga County jail during this pertinent period of time also testified that appellant was never absent from the cellblock, except for occasional court appearances. Several individuals employed by the Cuyahoga County sheriff at the time of appellant's confinement testified that each night a body count was taken, and that unless this count corresponded with records kept at the jail's booking desk a thorough search of the cellblock would be in order.

To overcome this evidence of alibi the prosecution introduced the testimony of two men, one of whom was certain he saw appellant on the street in Cleveland in July 1972, while the other man said he too saw appellant on the street in the summer of 1972, although he could not "remember the months and things." In addition, the prosecution brought before the jury's attention a number of distracting and irrelevant facts garnered primarily from newspaper articles, and having to do with, among other things, gambling and the use of drugs in the jail, a hunger strike

by the inmates, and the conviction of a former jail officer for theft of certain property.

Appellant moved, pursuant to Crim. R. 29, for a judgment of acquittal at the close of the state's case, and upon conclusion of the defense. The trial court denied both motions. It has been suggested that, in determining the sufficiency of the evidence to withstand a motion for a judgment of acquittal, the proper test is whether, after the evidence and all reasonable inferences that may be drawn therefrom are viewed in the light most favorable to the state, there must be some doubt in a reasonable mind as to the guilt of the accused. See *State v. Hancock* (1976), 48 Ohio St. 2d 147, 151-152. Similarly, the legal test for the sufficiency of alibi evidence is whether it raises a reasonable doubt of guilt. See *Walters v. State* (1883), 39 Ohio St. 215; *State v. Childs* (1968), 14 Ohio St. 2d 56. In light of the nature of appellant's alibi evidence, vis-a-vis the evidence presented by the state in rebuttal of the alibi, there must be some doubt in a reasonable mind as to the guilt of appellant. To conclude otherwise is to argue that the average reasonable mind would be convinced that one confined in the Cuyahoga County jail could manage to escape therefrom, could travel to another county, there to commit a murder, and could later re-enter the jail facility, undetected, only to be subsequently released by an order of the court. I believe it patently apparent that such a theory is rife with reasonable doubt.

Because the prosecution's case was insufficient to overcome appellant's alibi defense the trial court erred in denying appellant's motion for a judgment of acquittal. I must, therefore, respectfully dissent.

W. BROWN, J., concurs in the foregoing dissenting opinion.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING MOTION FOR REHEARING

(Filed June 24, 1983)

Nos. 81-3117, 81-3260

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

RAYMOND WALKER,
Petitioner-Appellee,

v.

TED ENGLE,
Respondent-Appellant.

ORDER

BEFORE: KEITH and JONES, *Circuit Judges*, and BROWN, *Senior Circuit Judge.*

The appellant has filed a motion for a rehearing and suggestion for rehearing en banc in the above-styled case. A majority of the active Judges of this Court have not favored a rehearing en banc and the motion was, thus, referred to the original panel. Upon consideration of the appellant's request, the panel has noted nothing of substance which was not carefully considered before issuance of the Court's order. Accordingly, the motion for rehearing is hereby DENIED.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

Office-Supreme Court, U.S.
F I L E D
OCT 13 1983

No. 83-522

Supreme Court of the United States

October Term, 1983

RAYMOND WALKER,
Cross-Petitioner,

vs.

TED ENGLE, SUPERINTENDENT
Southern Ohio Correctional Facility,
Cross-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR CROSS-RESPONDENT IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR CROSS-RESPONDENT IN OPPOSITION

Cross-Respondent, Ted Engle, Superintendent of the Southern Ohio Correctional Facility, respectfully requests that this Court deny the Cross-Petition for Writ of Certiorari seeking review of the Sixth Circuit's opinion in this case. Said opinion is reported at 703 F.2d 959.

REASON WHY THE WRIT SHOULD BE DENIED

The United States Circuit Court of Appeals for the Sixth Circuit rejected Cross-Petitioner's claim that he should be granted an unconditional discharge. In doing so, the Court upheld the ruling of United States District Judge Thomas, who had concluded that *Jackson v. Virginia*, 443 U.S. 307 (1979), neither required nor permitted such a judgment and freedom from retrial. Judge Thomas opined that apart from what he found to be prejudicial evidence, "the prosecution produced sufficient other evidence which, viewed in the light most favorable to the prosecution, would permit a reasonable trier of fact to find Walker guilty beyond a reasonable doubt." He categorized the jail records as circumstantial evidence of Walker's incarceration at the time of the offense, but noted that their probative value was undermined through proper cross-examination of various jail deputies and inmates.

In doing so, Judge Thomas rejected the recommendation of the United States magistrate for final discharge which Cross-Petitioner urges in his petition before this Court. This ruling was grounded solely on the magistrate's (and now the Cross-Petitioner's) assessment of the credibility of the state's witnesses. This amounts to a usurpation of a function solely reserved to the state court trier of fact. The credibility of witnesses is not a matter subject to review in federal habeas corpus courts. *Pickford v. U.S.*, 518 F.2d 831 (4th Cir. 1975); *Edwards v. Sasser*, 462 F. Supp. 374. This Court recognized this concept in *Jackson v. Virginia*, *supra* (443 U.S. at page 326). Likewise, in *Jackson*, *supra*, this Court affirmed its position taken in *Holland v. U.S.*, 384 U.S. 121, that the prosecution is not under any affirmative duty to rule out every hypothesis except that of guilt be-

yond a reasonable doubt, stating that a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences, must presume (even if it does not affirmatively appear from the record) that the trier of fact resolved the conflict in favor of the prosecution and defer to that resolution (443 U.S. at page 326), and recognized the continued function reserved to the jury, stating with regard to the standard for review, "This familiar standard gives full play to the responsibility of the triers of fact fairly to resolve conflicts in the testimony, to weigh the evidence and to draw reasonable inferences from basic facts to ultimate facts." (443 U.S. at p. 319.)

Cross-Petitioner in his petition attacks the testimony of the two co-defendants who, under strenuous cross-examination steadfastly maintained that Walker was the triggerman, as inherently untrustworthy and questionable by its tardiness. He also attacks the testimony of the third eyewitness, Rene Clark. Like the magistrate, he chooses not to believe these witnesses; but it is quite obvious from the verdict that the jurors did. The magistrate's report, which is the only support for petitioner's position, was replete with statements of his personal opinion on the credibility of these and other witnesses. His Honor Judge Thomas, properly rejected this concept that the federal judiciary may cavalierly substitute its assessment of credibility for that of the twelve jurors who actually saw and heard the witnesses.

In reaching his determination that there was sufficient properly admitted evidence from which a rational trier of fact could find guilt beyond a reasonable doubt, His Honor Judge Thomas reviewed the testimony of co-defendants, Davidson and Ogeltree, and that of Clarence Cash, James Curry, Rene Clark, Mable Mack and Willie Mae Hart, and presumably, all of the evidence, conclud-

ing that a retrial was not prohibited and citing the following from *Jackson v. Virginia, supra*:

> But this inquiry does not require a court to ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.

The District Judge also reviewed the alibi defense. He then, of course, rejected Cross-Petitioner's ridiculous proposition that jail records, unlike any other alibi evidence, are conclusive and unassailable. The Court noted many discrepancies revealed by cross-examination, finding that the jail records did not provide "conclusive proof" that Walker was in jail on July 22nd and noting that the weight to be assigned to those records and the credibility of the witnesses were for the jury to decide. Cross-Petitioner's arguments are fogged by the same fault as the magistrate, who formed an opinion and then searched the record for support. As Judge Thomas noted, "The magistrate ignored the jury's right to accept all, part or none of the jail record testimony."

The District Court applied the reasoning of the United States District Court for the Eastern District of Wisconsin in *Harris v. Clusen*, 487 F. Supp. 617 (1980), wherein the habeas petitioner had challenged the sufficiency of the evidence under the *Jackson, supra*, standard. That Court, confronted with a similar alibi defense, held:

> Viewing the evidence in this case in the light most favorable to the prosecution, four persons identified the petitioner as the person who committed the armed robbery, and one testified that she saw a gun in petitioner's possession in commission of the robbery. Given the directly contrary testimony of petitioner's witnesses that he was in Chicago at the time, the jury, as the trier of facts, was required to choose

> between believing the prosecution or the petitioner's witnesses and it was entitled to make that choice in the manner in which it did. (487 F. Supp. at pp. 617 to 618.)

In reviewing Judge Thomas's order, the Sixth Circuit noted that the state had placed Walker at the scene of the crime through the testimony of Davidson and Ogeltree, accomplices to the crime; Rene Clark, a disinterested witness; and Mable Mack, wife of the deceased. The state also placed Walker outside the jail during the relevant period through testimony of Clarence Cash, who allegedly spoke with Walker in an after-hours bar during June, 1972; James Curry, who allegedly spoke with Walker at a garage around mid-June; and Mrs. Willie Mae Hart, who resided near the A & P store and who saw a brown automobile leave the scene of the crime driven by a black man with a bad complexion "similar to" Walker's. The Court noted that the magistrate had rejected this testimony and Judge Thomas found that the magistrate had erred by weighing the testimony and failing to view the evidence in a light most favorable to the prosecution, noting that credibility is not a matter of review for federal habeas corpus courts and finding that the testimony of state's witnesses, if believed, would provide sufficient evidence to support the conviction—thus, warranting a retrial.

The position taken by the Sixth Circuit is supported by two recent decisions of this Court. In *Maggio v. Fulford*, 103 S. Ct. 2261 (6/6/83), this Court affirmed that federal habeas corpus courts are not to reject a state court's factual conclusion as not "fairly supported by the record" within the meaning of 28 U.S.C. Section 2254(D)(a) by reassessing the credibility of witnesses who testified in the state proceedings. This Court noted that it was error for the Circuit Court to substitute its own judgment as to the

credibility of witnesses for that of the Louisiana Court's prerogative which 28 U.S.C. Section 2254 does not allow. Going on to state that even if the key witness for the defendant in the state proceedings was "unimpeached," the rejection of his testimony by the state court would not permit a conclusion that the state court's factual findings were not "fairly supported by the record." See also *Marshall v. Lonberger,* 103 S. Ct. 843.

Thus, it is submitted that the Sixth Circuit Court of Appeals was correct in its conclusion that retrial in the instant case is not precluded by *Jackson, supra,* and only usurpation of the credibility determination function of the state trial courts can lead to any other conclusion.

CONCLUSION

It is respectfully submitted that the Cross-Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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